

to add the power of enforcing the execution of them, in payment of legacies. But there are no testimonies of those times that warrant us to conclude, that this had generally obtained before the reign of Henry III. ^a.

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It seems doubtful, whether the mode used by the Saxons for the distribution of the estates of *intestates* continued during the whole of this period. A law of Henry I. says, that upon a person dying intestate, those who were intitled to succeed should divide his effects *pro animâ ejus*. This is the first mention in our law of a disposition of an intestate's effects for the benefit of his soul; but there is no mention of the controul or intermeddling of the bishop, either in this law, or, even later than this, in Glanville; although he expressly mentions the jurisdiction of the church as to testaments.

In king John's charter it was expressly provided, that if any freeman died intestate, his chattels should be disposed of by the hands of his next of kin, *per visum ecclesiarum*, by the advice and direction of the ordinary, saving to all creditors their debts. This clause, it is said, was word for word in the charter of Hen. III. and is to be seen in several manuscripts of it; but being left out of the exemplification of this charter on the roll 25. Ed. I. from which is copied the *Magna Charta* in our statute books, it is not now found there. This provision was probably inserted by the contrivance of the bishops, who, with Pandolfo the pope's nuncio, were with John at Runnymede. There was not wanting colour for a provision like this; for as the statute of Henry I. before alluded to, had expressly said, that the distribution was to be *pro animâ intestati*, the bishops seemed, by their holy function, to be best qualified to see this office performed with fidelity. Hence it was, that, in after-times, this power was delegated by the ordinary to the next of kin, in letters or otherwise; an autho-

^a Seld. Works, vol. 3. 1672.^b Ibid. 1676.

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rity grounded upon these words of the charter, *per visum ecclesie*[†]; though there are no documents that assure us this law was put in force during the reign of king John.

In the reign of Stephen the clergy began to draw into the spiritual court the trial of persons *pro læsione fidei*, that is, for breach of faith in civil contracts. By means of this they took cognizance of many matters of contract which belonged properly to the temporal court. This was the boldest stretch which that tribunal ever made to extend its authority, and would, in time, have drawn within its jurisdiction most of the transactions of mankind. The pretence on which they founded this claim was probably this: that oaths and faith solemnly plighted being of a religious nature, the breach of them more properly belonged to the spiritual than to the lay tribunal.

The circumstances of the times tended very much to encourage the clergy in their scheme of opposition to the secular power. The provision for the clergy was in those days very precarious, and left them at the mercy of their patrons. Being, in general, from their function, considered as a sacred body of people, when oppressed and ill-treated by potent lords, they drew the compassion of many, and particularly the support of their bishops; who, in their turn, receiving as little favour from kings, were continually increasing their store of merit with the sovereign pontiff by the many struggles they engaged in on their own account, and on account of their inferior brethren. The pope, no ungrateful sovereign, always distinguished his zeal in supporting his bishops, as they did in supporting the lower clergy; till the several orders of ecclesiastics, united in a common cause, and sharpened against the laity by long contention, encouraged each other, by every motive of defence and aggrandizement, to contribute in their stations to promote the power of the church. The pope having made

[†] Sold. Works, vol. 3. 1679.

use of the bishops to gain and govern the clergy, united all their powers to establish a dominion over the laity; and no occasion was let pass in which any of them could snatch an advantage.

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HENRY I. being seated on the throne by a doubtful title, thought it prudent to gain the clerical part of his subjects by some concessions. Stephen, who owed his authority entirely to them, went further. By these means they acquired such confirmed strength and habitual reverence from the people, that, notwithstanding all the power of Henry II. and the spirit with which he asserted his sovereignty and independence, the contest he had with Becket tended to an issue directly contrary to that which he had promised himself; so that, after some concessions and connivance, to which he submitted in fits of repentance, his reign ended in a firm establishment of the clergy in most of their extraordinary claims of privilege and jurisdiction.

THE contest that Henry II. had with Becket concerning the limits of ecclesiastical power, fills up a great part of that king's reign. To give weight to his side of the contest, and, instead of debating, to effect a clear decision, Henry procured an act of the legislature formally enacting the principal points of controversy for which he contended. This was the famous *Constitutions of Clarendon*.

AT a great council held at Clarendon, A. D. 1164, in the 10th year of his reign, a code of laws was brought forward by the king, under the title of *the ancient customs of the realm*; and as Becket had solemnly promised he would observe what were really such, the king procured the principal propositions in dispute to be enacted, and declared by the council under that denomination. Nothing will enable us to judge so well of the pretensions of the clergy, as a perusal of these Constitutions; they shall therefore be stated at length. They are contained in sixteen articles; ten of which were considered by the see of Rome as so hostile to the rights of the clergy, that pope Alexander in full consistory passed

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passed a solemn condemnation on them; the other six he *tolerated, not as good, but less evil*. These six articles were the 2d, 6th, 11th, 13th, 14th, and 16th.

✓ THE 2d, Churches belonging to the fee of our lord the king cannot be given away in perpetuity, without the consent and grant of the king. 6th, Laymen ought not to be accused, unless by certain and legal accusors and witnesses, in presence of the bishop, so as that the archdeacon may not lose his right, nor any thing which should thereby accrue to him; and if the offending persons be such as none will or dare accuse them, the sheriff, being thereto required by the bishop, shall swear twelve lawful men of the vicinage or town before the bishop, to declare the truth according to their conscience. 11th, Archbishops, bishops, and all dignified clergymen, who hold of the king in chief, have their possessions from the king as a barony, and answer thereupon to the king's justices and officers, and follow and perform all royal customs and rights, and, like other barons, ought to be present at the trials of the king's court, with the barons, till the judgment proceeds to loss of members, or death. 13th, If any nobleman of the realm shall forcibly resist the archbishop, bishop, or archdeacon, in doing justice upon him or his, the king ought to bring them to justice; and if any shall forcibly resist the king in his judicature, the archbishops, bishops, and archdeacons, ought to bring him to justice, that he may make satisfaction to our lord the king. 14th, The chattels of those who are under forfeiture to the king, ought not to be detained in any church or church-yard against the king's justice, because they belong to the king, whether they are found within churches, or without. 16th, The sons of villains ought not to be ordained without the consent of their lords, in whose lands they are known to have been born.

THUS was the pope pleased to tolerate such of these articles as either did not at all affect the clerical state, or rather

* So *universae personae* is construed by Lord Littleton in his Hen. II. vol. 4. 370.

contributed to aid and support it; and were thrown in, probably, to qualify and temper those which were evidently hostile to the ecclesiastical sovereignty. The ten which were condemned by the pope, were as follow.

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THE 1st, If any dispute shall arise concerning the advowson and presentation of churches between laymen, or between ecclesiastics and laymen, or between ecclesiastics, let it be tried and determined in the court of our lord the king. 3d, Ecclesiastics charged and accused of any matter, and being summoned by the king's justice, shall come into his court to answer there concerning that which it shall appear to the king's court is cognizable there; and shall answer in the ecclesiastical court concerning that which it shall appear is cognizable there; so that the king's justice shall send to the court of holy church, to see in what manner the cause shall be tried there; and if an ecclesiastic shall be convicted, or confess his crime, the church ought not any longer to give him protection. 4th, It is unlawful for archbishops, bishops, or any dignified clergymen of the realm, to go out of the realm without the king's licence; and if they go, they shall, if it so please the king, give security that they will not, either in going, staying, or returning, procure any evil or damage to the king, or kingdom. 5th, Persons excommunicated ought not to give any security by way of deposit, nor take any oath, but only find gage and pledge to stand to the judgment of the church, in order to absolution. 7th, No tenant *in capite* of the king, nor any of the officers of his household, or of his demesne, shall be excommunicated; nor shall the lands of any of them be put under an interdict, unless application shall first have been made to our lord the king, if he be in the kingdom, and if not, to his justice, that he may do right concerning such person; and in such manner, as that which shall belong to the king's court shall be there determined, and what shall belong to the ecclesiastical court shall be sent thither to be there determined. 8th, Concerning appeals,

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peals, if any shall arise, they ought to proceed from the archdeacon to the bishop, and from the bishop to the archbishop: and if the archbishop shall fail in doing justice, the cause shall at last be brought to our lord the king, that, by his precept, the dispute may be determined in the archbishop's court; so that it ought not to proceed any further without the king's consent. 9th, If there shall arise any dispute between an ecclesiastic and a layman, or between a layman and an ecclesiastic, about any tenement which the ecclesiastic pretends to hold *in eleemosynā*, and the layman pretends to be a lay fee, it shall be determined by the judgment of the king's chief justice, upon a recognition of twelve lawful men, *utrum tenementum sit pertinens ad eleemosynum, sive ad feodum laicum*. And if it be found to be *in eleemosynā*, then it shall be pleaded in the ecclesiastical court; but if a lay fee, then in the king's court, unless both parties claim to hold of the same bishop or baron: and if they do, then the plea shall be in his court; provided, that by such recognition, the party who was first seised shall not lose his seisin till the plea has been finally determined. 10th, Whosoever is of any city, or castle, or borough, or demesne manor of our lord the king, if he shall be cited by the archdeacon or bishop for any offence, and shall refuse to answer to such citation, may be put under an interdict; but he ought not to be excommunicated till the king's chief officer of the town be applied to, that he may, by due course of law, compel him to answer accordingly; and if the king's officer shall fail therein, such officer shall be *in misericordiā regis*; and then the bishop may compel the person accused by ecclesiastical justice. 12th, Pleas of debt, *quæ fide interposita debentur, vel absque interpositione fidei*, whether due by faith solemnly pledged, or without faith so pledged, belong to the king's judicature. 15th, When an archbishopric, or bishopric, or abbey, or priory of royal foundation, shall be vacant, it ought to be in the hands of the king, and he shall receive

ceive

ceive all the rents and issues thereof, as of his demefne. And when such church is to be filled, the king ought to send for the principal clergy thereof, and the election ought to be made in the king's chapel, with the king's assent, and the advice of such of the prelates of the kingdom as he shall call for that purpose^a; and the person elect shall there do homage and fealty to the king as his liege lord, of life, limb, and worldly honour (saving his order), before he be consecrated^x.

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THESE Constitutions were calculated to give a rational limitation to the secular and ecclesiastical judicature; and furnished a basis on which these separate jurisdictions might have been founded, without any inconvenience to the nation, or diminution of the temporal authority; and they were with that view confirmed, A. D. 1176, at a council held at Northampton. But the king, overcome with shame for the murder of Becket, with which he was charged, and struck with a panic of superstition, gave way to the torrent, and endeavoured to reconcile himself to the holy see by an ample concurrence with all its demands; at least he desisted from executing those laws for which he had so many years been contending. It appears, moreover, from a letter which he sent to the pope by the hand of *Hugo Petrelee*, the legate, that, *notwithstanding the opposition of the greatest and wisest men in his kingdom*, he had, at the intercession of the legate, and out of reverence and devotion to the see of Rome, made the following concessions: That no clerk should, for the future, be brought personally before a secular judge for any crime or transgression^y whatsoever, except only for offences against the forest laws, or in case of

^a *Debet fieri electio assensu domini regis, et consilio personarum regni quas ad hoc faciendum vocaverit.*

^x Vid. Wilk. Ang. Sax. Leg. p. 321. and also in Lat. Hen. II. vol. 4. 414. a copy of these Constitutions

from the Cottonian manuscript of Becket's Life and Epistles, which is probably the most ancient and correct copy of them.

^y *De aliquo facto facto.*

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a lay fee for which lay service was due to the king, or to some other secular person. He promised, that any person convicted, or making confession before his justice, in the presence of the bishop, or his official, of having knowingly and premeditatedly killed a clerk, should, besides the usual punishment for killing a lay man, forfeit all his land of inheritance for ever^a. He also promised, that clerks should not be compelled to submit to the trial by duel; and moreover, he promised not to retain in his hands vacant bishoprics or abbeys beyond the term of one year, unless from urgent necessity, and evident cause of delay, not falsely pretended^b. It is said^b, that Henry, by charter, granted to the clergy the cognizance of causes matrimonial; but neither this nor any other of the foregoing concessions were enacted by authority of parliament, during any part of this king's reign; nor did he himself observe them, except in not compelling criminal clerks to appear before a lay judge, as before stipulated, and in exempting them in all cases from the trial by duel. The statutes of Clarendon concerning ecclesiastical matters subsisted unrepealed and confirmed; but were suspended in part by a temporary connivance of the executive power^c.

THE establishment which the clergy gained in this reign was not weakened in those of his successors. Richard I. was redeemed from his captivity by the aid of his subjects; among whom the zeal of the ecclesiastics, who readily converted their plate and other valuables to the ransom of their king, was particularly distinguished. This gave them every thing to hope from the king's gratitude; nor were they disappointed in their expectations. The feudal subjection under which John laid his kingdom to the pope,

^a What extraordinary penalty was this, when laymen, at that time, forfeited their lands in cases of felony?

^b Wilk. Leg. Ang. Sax. p. 332.
 Lit. Hist. Hen. II. vol. 4. 265.
 296.

^b Sir Roger Owen MSS. p. 597.

^c Sir Roger Owen says, the king obtained a parliamentary repeal of the Constitutions of Clarendon. MSS. p. 413.

fatified every clerical innovation, and seemed to justify the distinctions before claimed by the churchmen.

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IN this manner did the influence of the civil and canon law gradually increase; but these laws were not confined to the ecclesiastical courts, where they were professedly the only rules of decision: they, by degrees, interwove themselves into the municipal law, and furnished it with helps towards improving its native stock. The law of personal property was in a great measure borrowed from the imperial, and the rules of the descent of lands wholly from the canon law: to these might be added many other instances of imitation, too long to be enumerated in the present work.

THESE two laws, as the Norman had before, obtained here by sufferance and long usage. Such parts of them as were fitting and expedient, were quietly permitted to grow into practice; while such as were of an extravagant kind occasioned clamour, were called usurpations, and, as such, were strongly opposed. What was suffered to establish itself, either in the clerical courts, or by mingling with the secular customs, became so far part of the common law of the realm, equally with the Norman; for though of later birth, it had gained its authority by the same title, a length of immemorial prescription^d.

It

^d This is all that I thought necessary to state concerning the prevalence of the civil and canon law, and the influence they both had upon the common custom of the realm; and I have heard no complaint, as in the case of feuds, that this part of the work is at all defective: indeed, I should not wonder, if some thought even this short sketch too prolix; so much are our studies and opinions directed by fashion. But it seems to me, if the illustration of our ancient law had been the sole object of attention, and not a prepossession in favour of a topic that happened to be in vogue, that

the same censure would be at least as applicable in one as in the other case.

A comparison of our law with those two systems of jurisprudence, would, in my mind, be an enquiry of equal curiosity, and much more to the purpose of a history of the English law, than the same process when applied to the so-much-admired systems of foreign feuds. This is sufficiently evinced by the cursory remarks already made respecting these two laws. It further appears by the works of Glanville, Bracton, and other old authors, who certainly wrote the law of their time, and not their own inventions, as has been too

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Of trial by duel
in civil que-
stions.

It had been a very ancient custom among the Normans, both in their own country and in France, to try titles to land, and other questions, by *duel*. When William had ordained that this martial practice of his own country should be observed here in criminal trials, it became very easy to introduce it into civil ones; and being only used in the *curia regis*, it had not, among the other novelties of that court, as it certainly would have had in the county court, or any other of the ancient tribunals of Saxon original, the appearance of so singular an innovation.

WITH all its absurdity, this mode of trial was not without some marks of a rational reliance on testimony, and vouchers for the truth of what was in dispute; for it was never awarded without the oath of a credible witness, who would venture his life in the duel for the truth of what he swore. "I am ready," says the party litigant, "to prove it by my freeman John, whom his father on his death-bed enjoined, by the duty he owed him, that

often and too inconsiderately said; and it is confirmed by marks of conformity, or imitation, in instances where no suspicion of fabrication was ever entertained.

The civil and canon law seem in a particular manner to be objects of curiosity to an English lawyer; they have long been domesticated in this country; were taught at our universities as a part of a learned education, and the road to academic honours; they have entered into competition with the common law; and, though unsuccessful in the struggle, were still thought worthy to be retained in our ecclesiastical courts, and there became the model by which our national canons and provincial constitutions were framed. These two laws, therefore, stand in a much nearer relation to the common law, than the feudal law of Lombardy, or of any foreign country; none of which can boast any pretensions equal to those above-mentioned.

Notwithstanding this close affinity between the civil and canon law and our own, I thought, that to enter into a particular comparison of such parts of those laws as seemed more remarkably to relate to the common law, was an enquiry not strictly within the compass of the present History; and therefore I declined it, for reasons similar to those I have before given with regard to foreign laws.

I cannot, however, leave this subject without expressing a wish, that the early connexion of our law with the civil and canon law was more fully investigated than it has yet been. The history and present state of those two laws in this country, and of our own national canon law, seems also to have been not yet sufficiently developed. To this it may be answered, that there is at least as great want of curiosity upon this topic, as of information; and I am sure I do not pretend to determine which of these is the cause, and which the effect, of the other.

"if at any time he should hear of a suit for this land, he should hazard himself in a *duel* for it, as for that which his father had *seen and heard*." Thus the champion of the demandant was such a one as might be a fit witness; and on that account the demandant could never engage in the combat himself: but the other party, who was defendant, or tenant, in the suit, might engage either in his own person, or by that of another.

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It is difficult to say what matters were, at one time, submitted to this mode of trial. Perhaps at first all questions of fact might, at the option of the demandant, have been tried by duel. In the reign of Henry II. it was decisive in pleas concerning freehold; in writs of right; in warranty of land, or of goods sold; debts upon mortgage or promise; sureties denying their suretyship; the validity of charters; the manumission of a villain; questions concerning services: all these might have been tried by duel^f.

NOTWITHSTANDING the general bent of this people to admit the propriety of a trial so suitable to their martial genius, there must have been men of gravity and learning amongst them at all times; and persons of that character would always reprobate so ineffectual and cruel a proceeding. Considerations of this kind at last effected a change.

We find in the reign of Henry II. that many questions of fact relating to property were tried by twelve *liberos et legales homines juratos*, sworn to speak the truth; who were summoned by the sheriff for that purpose. This tribunal was, in some cases, called *assisa*, from *assidere*, as it is said, because they sat together; though it is most probable, and indeed seems intimated by the manner in which Glanville often expresses himself, that it was emphatically so called

Of trial by jury,

* Aristotle, in the true spirit of the old jurisprudence, as well as of chivalry, makes Rinaldo refer to the trial of arms, as equal to if not stronger than that by testimony.

*Col testimonio, io vo', che l'arme s'era:
Che era, e in ogni tempo, che si piace,
Te n'abbiamo a far prova piu verace.*

Orl. Fur. cant. 31. Stanz. 102.

^f Glanv. patron.

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from the *assisa* (as laws were then termed), by which the application of this trial was, in many instances, ordained. On other occasions this trial was called *jurata*, from the *juratos*, or *juratores*, who composed it. Of the origin of this trial by twelve jurors, and the introduction of it into this country, we shall next enquire.

THE trial *per duodecim juratos*, called *nambda*, had obtained among the *Scandinavians* at a very early period; but having gone into disuse, was revived, and more firmly established, by a law of *Reignerus*, surnamed *Lodbrog*, about the year A. D. 820^a. It was about seventy years after this law, that *Rollo* led his people into *Normandy*, and, among other customs, carried with him this method of trial; it was used there in all causes that were of small importance. When the Normans had transplanted themselves into England, they were desirous of legitimating this, as they did other parts of their jurisprudence; and they endeavoured to substitute it in the place of the Saxon *sectatores*, to which tribunal it bore some shew of affinity.

THE earliest mention we find of any thing like a *jury*, was in the reign of William the Conqueror, in a cause upon a question of land, where *Gundulph*, bishop of *Rocheſter*, was a party. The king had referred it to the county, that is, to the *sectatores*, to determine in their county court, as the course then was, according to the Saxon establishment; and the *sectatores* gave their opinion of the matter. But *Odo*, bishop of *Bayeux*, who presided at the hearing of the cause, not satisfied with their determination, directed, that if they were still confident that they spoke truth, and persisted in the same opinion, they should chuse *twelve* from among themselves, who should confirm it upon their *oaths*^b. It seems as if the bishop had here taken a step which was not in the usual way of proceeding, but which he ventured upon in conformity with the practice of his own country; the general

^a Hick. Thes. Diff. Epist. 38, 39, 40.

^b Text. Ross. apud Hickeys, ut sup.
Law

law of England being, that a judicial enquiry concerning a fact should be collected *per omnes comitatūs probos homines*. Thus it appears, that in a cause where this same Odo was one party, and archbishop Lanfranc the other, the king directed *TOTUM comitatum considerare*; that all men of the county, as well French as English, (particularly the latter) that were learned in the law and custom of the realm, should be convened: upon which they all met at Pinendena, and there it was determined *AB OMNIBUS illis probis*, and agreed and adjudged *à toto comitatu*. In the reign of William Rufus, in a cause between the monastery of Croyland and Evan Talbois, in the county court, there is no mention of a jury; and so late as the reign of Stephen, in a cause between the monks of Christ-Church, Canterbury, and Radulph Picot, it appears from the acts of the court^k, that it was determined *per judicium TOTIUS COMITATUS*^l.

THIS trial by an indefinite number of *sectatores* or *suitors* of court continued for many years after the Conquest: these are the persons meant by the terms *pares curiæ*, and *judicium parium*, so often found in writings of this period. Successive attempts gradually introduced jurors to the exclusion of the *sectatores*; and a variety of practice, no doubt, prevailed till the Norman law was thoroughly established*. It was not till the reign of Henry II. that the trial by jurors became general; and by that time, the king's itinerant courts, in which there were no *pares curiæ*, had attracted so many of the country causes, that the *sectatores* were rarely called into action†.

THE sudden progress then made in bringing this trial into common use, must be attributed to the law enacted by that king. As this law has not come down to us, we are ignorant at what part of his reign it was passed, and what was the precise extent of its regulation: we can only col-

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assise.^k Bib. Cott. Paulina, A. 3. II. 31.^l Hicet Thes. Diss. Ep. 36.* The following law of Henry I. seems to be in support of the antient usage. *Unquisq; PER PARES suos judicandus est: et ipsi sui provincie; PARITURA omne iudicia multum.**lex salmoneensis*, Leg. 31.† Persons of a new character, under the name of *secta* and *sectatores*, in a subsequent period, made a necessary part of most actions brought in the king's courts, as will be seen hereafter.

CHAP. II. lect such intimation as is given us by cotemporary authorities, the chief of which is Glanville, who makes frequent allusion to it. It is called by him *assisa*, as all laws then were, and *regalis constitutio*; at other times, *regale quoddam beneficium, clementiâ principis de concilio procerum populis indultum*. It seems as if this law ordained, that all questions of *seisin* of land should be tried by a recognition of twelve good and lawful men, sworn to speak the truth; and also that in questions of *right* to land, the tenant might elect to have the matter tried by twelve good and lawful knights instead of the duel. It appears that some incidental points in a cause, that were neither questions of mere *right*, nor of *seisin* of land, were tried by a recognition of twelve men; and we find that in all these cases, the proceeding was called *per assisam*, and *per recognitionem*; and the persons composing it were called *juratores, jurati, recognitores assisæ*; and collectively *assisa*, and *recognitio*: only the twelve jurors in questions of right were distinguished with the appellation of *magna assisa*; probably because they were knights, and were brought together also with more ceremony, being not summoned immediately by the sheriff, as the others were, but elected by four knights, who for that purpose had been before summoned by the sheriff. We are also told, that the law by which these proceedings were directed, had ordained a very heavy penalty on jurors who were convicted of having sworn falsely in any of the above instances¹.

Thus far of one species of this trial by twelve men, which was called *assisa*. It likewise appears, that the oath of twelve jurors was resorted to in other instances than those provided for by this famous law of Henry II. and then this proceeding was said to be *per juratam patriæ, or vicinæ, per inquisitionem, per juramentum legalium hominum*. This proceeding by jury was no other than that which we before mentioned to have gained ground by usage and custom. This was sometimes used in questions of property; but, it should seem, more frequently in matters of a criminal nature.

¹ Glan. lib. 15. c. 1. lib. 2. c. 7. 19.

THE earliest mention of a trial by jury, that bears a near resemblance to that which this proceeding became in after-times, is in the Constitutions of Clarendon before spoken of. It is there directed, that, should nobody appear to accuse an offender before the archdeacon, then the sheriff, at the request of the bishop, *faciet jurare duodecim legales homines de vicineto, seu de villâ, quod inde veritatem secundum conscientiam suam manifestabunt* ^m. The first notice of any recognition, or *assise*, is likewise in these Constitutions; where it is directed, that, should a question arise, whether land was lay or ecclesiastical property, *recognitione duodecim legalium hominum per capitalis justitiæ considerationem terminabitur, utrum, &c.* ⁿ; this was A. D. 1164. Again, in the statute of Northampton, A. D. 1176, (which is said to be a republication of some statutes made at Clarendon, perhaps at the same time the before-mentioned provisions were made about ecclesiastical matters) the justices are directed, in case a lord should deny to the heir the seisin of his deceased ancestor, *faciant inde fieri recognitionem per duodecim legales homines, qualem seisinam defunctus inde habuit die quâ fuit vivus et mortuus*; and also *faciant fieri recognitionem de disseisinis factis super assisâ, tempore quo the king came into England, after the peace made between him and his son*. We see here, very plainly described, three of the assises of which so much will be said hereafter; the *assisa utrum scedum sit laicum an ecclesiasticum*; the *assisa mortis antecessoris*; and the *assisa novæ disseisinæ*. Again, in the statute of Northampton there is mention of a person *reclatus de mardo per sacramentum duodecim militum de hundredo, and per sacramentum duodecim liberorum legalium hominum*.

THUS have we endeavoured to trace the origin and history of the trial by twelve men sworn to speak the truth, down to the time of Glanville: a further and more particular

^m Ch. 6.

ⁿ Ch. 9.

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Of deeds.

account of it we shall defer, till we come to speak more minutely of the proceedings of courts at this time.

ANOTHER novelty introduced by the Normans, was the practice of making deeds with seals of wax and other ceremonies *. The variety of deeds which soon after the Conquest were brought into use, and the divers ways in which they were applied for the purpose of transferring, modifying, or confirming rights, deserve a very particular notice.

DEEDS or writings, from the time of the Conquest, were sometimes called *chirographa*, but more generally *chartæ*: the latter became a term of more common use, and so continued for many years; the former rather denoted a species of the *chartæ*, as will be seen presently. Charters were executed with various circumstances of solemnity, which it will be necessary to consider: these were the seal, indenting, date, attestation, and direction, or compellation.

CHARTERS were sometimes brought into court; either the king's, or the county, hundred, or other court, or into any numerous assembly; and there the act of making, or acknowledging and perfecting the charter was performed. This accounts for the number of witnesses often found to old charters, with the very common addition of *cum multis aliis*. When charters were not executed in this public manner, they were usually attested by men of character and consequence: in the country, by gentlemen and clergymen; in cities and towns, by the mayor, bailiff, or some other civil officer †.

THE Anglo-Saxon practice of affixing the cross still continued; yet was not so frequent as before; but gave way to a method which more commonly obtained after the Conquest, namely, that of affixing a *seal of wax*. Seals of wax were of various colours. They were commonly round or oval, and were fixed to a label of parchment, or

* Wilk. Leg. Sax. 289.

† Rad. Form. Diss. 26.

to a silk string fastened to the fold at the bottom of the charter, or to a slip of the parchment cut from the bottom of the deed, and made pendulous. Besides the principal seal there was sometimes a counter-seal, being the private seal of the party. If a man had not his own seal, or if his own seal was not well known, he would use that of another; and sometimes, for better security, he would use both his own and that of some other better known.

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THE original method of *indenting* was this. If a writing consisted of two parts, the whole tenor of it was written twice upon the same piece of parchment; and, between the contents of each part, the word *chirographum* was written in capital letters, and afterwards was cut through in the midst of those letters; so that, when the two parts were separated, one would exhibit one half of the capital letters, and one the other; and when joined, the word would appear entire. Such a charter was called *chirographum*. About the reign of *Richard* and *John*, another fashion of cutting the word *chirographum* came into use; it was then sometimes done *indent-wise*, with an acute or sharp incision, *inftar dentium*^a; and from thence such deeds were called *indenturæ*.

CHARTERS were sometimes dated, and very commonly they had no date at all; but as they were always executed in the presence of somebody, and often in the presence of many, the names of the witnesses were inserted, and constituted a particular clause, called *his testibus*. The names of the witnesses were written by the clerk who drew the deed, and not by the witnesses themselves, who very often could not write. It seems, that wives were sometimes witnesses to deeds made by their husbands; monks and other religious persons to deeds made by their own houses; even the king is found as witness to the charters of private men^b; and in the time of *Richard* and *John*, it came in

^a *Med. Form. Diss.* 74. c3, 29.

^b *Ibid.* 31.

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practice for him to attest his own charters himself in the words *teste meipso* ².

CHARTERS were usually conceived in the stile of a letter, and, at the beginning, they had a sort of direction, or compellation. These were various. In royal charters, it was sometimes, *omnibus hominibus suis Francis & Anglis*: in private ones, sometimes, *omnibus sanctæ ecclesiæ filiis*; but more commonly, *sciant presentes et futuri*, or *omnibus ad quos presentes literæ*, &c.

THUS far of the circumstances and solemnities attending the execution of charters. Let us now consider the different kinds of them; and it will be found, that as they were called *chirographa*, or *indenturæ*, from their particular fashion, so they received other appellations expressive of their effect and design. A charter was sometimes called *conventio*, *concordia*, *finalis concordia*, and *finalis conventio*. There were also *feoffments*, *demises for life* and for years, *exchanges*, *mortgages*, *partitions*, *releases*, and *confirmations* ¹.

CONVENTIO and *concordia* had both the same meaning, and signified some agreement, according to which one of the parties conveyed or confirmed to the other any lands, or other rights.

Of feoffment.

OF all charters the most considerable was a *feoffment*. After the time of the Conquest, whenever land was to be passed in fee, it was generally done by feoffment and delivery or livery of seisin ³. This might be without deed; but the gift was usually put into writing, and such instrument was called *charta feoffamenti*. A feoffment originally meant the grant of a *feud* or *fee*; that is, a barony or knight's fee, for which certain services were due from the feoffee to the feoffor: this was the proper sense of the word: but by custom it came afterwards to signify also a grant of a free *inheritance* to a man and his heirs, referring rather to the perpetuity of

¹ Mad. Form. Diss. 32.

² Ibid. 3.

³ Wilk. Leg. Sax. 259.

estate than to the feudal tenure. The words of donation were generally, *dedisse, concessisse, confirmasse, or donasse*, some one or other of them. It was very late, and not till the reign of Richard II. that the specific term *feoffavi* was used. These feoffments were made *pro homagio et servitio*, to hold of the feoffor and his heirs, or of the chief lord.

AT this early period feoffments were very unsettled in point of form; they had not the several parts which, in after-times, they were expected regularly to contain. The words of limitation, to convey a fee, whether absolute or conditional, were divers. A limitation of the former was sometimes worded thus: to the feoffee *et suis*; or *suis post ipsum, jure hæreditario perpetuo possidendum*; or *sibi et hæredibus suis vel assignatis*: of the latter thus: *sibi et hæredibus procedentibus ex prædictâ: Richardo et uxori suæ et hæredibus suis, qui de eadem veniunt: sibi et hæredibus, qui de illo exhibent*: from which divers ways of limiting estates (and numberless other ways might be produced) it must be concluded, that no specific form had been agreed on as necessarily requisite to express a specific estate; but the intention of the grantor was collected, as well as could be, from the terms in which he had chosen to convey his meaning *.

It appears, that a charter of feoffment was sometimes made by a feme covert, though generally with the consent of the husband; and a husband sometimes made a feoffment to his wife. A feoffment was sometimes expressed to be made with the assent of the feoffor's wife †; or of such a one, heir ‡ of the feoffor; or of more than one, heirs of the feoffor §; though in such cases, the charter appears to be sealed only by the feoffor. By the assent of the wife, probably, her claim of dower was in those days held to be barred; and indeed, when such feoffment was made publicly in court, it had the notoriety of a fine; and might consistently enough with modern notions, be allowed the

* Wilk. Leg. Sax. 5.

† Mad. Form. 148.

‡ Mad. Form. 316.

§ Ibid. 319.

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efficacy since attributed to fines in the like cases. The assent of the heirs was, probably, where the land had descended from the ancestor of the feoffor; or where by usage it retained the property of *boecland*, not to be aliened *extra cognationem*, without the consent of the heir, where such restriction had been imposed by the original *landboe*.

A CLAUSE of *warranty* was always inserted; which sometimes, too, had the additional function of an oath. The import of this warranty was, that should the feoffee be evicted of the lands given, the feoffor should recompense him with others of equal value^b.

A CHARTER of feoffment was not a complete transfer of the inheritance, unless followed by *livery of seisin*. This was done in various ways; as *per fustem*, *per baculum*, *per bosham*, *per annulum*, and by other symbols, either peculiarly significant in themselves, or accommodated by use, or designation of the parties, to denote a transmutation of possession from the feoffor to the feoffee.

THIS was the nature of a feoffment with livery of seisin, as practised in these early times. It was the usual and most solemn way of passing inheritances in land; but yet was not of so great authority as a *fine*, which had the additional function of a record to preserve the memory of it.

A fine.

THE antiquity of *fin*es has been spoken of by many writers. Some have gone so far as to assert their existence and use in the time of the Saxons^c. But upon a strict enquiry, it is said, there are no *fin*es, properly so called, before the Conquest, though they are frequently met with^d soon after that period^e.

WE shall now consider the manner in which *fin*es have been treated, or, as it is now called, *levied*. The account of *fin*es given by Glanville does not enable us to fix any

^b Mad. Form. 7.

^c Plowd. 360.

^d Mad. Form. Dist. ibid.

^e The origin of *fin*es is very fully considered by Mr. Cruise, in his valu-

able Essay on Fines, who thinks, and with great shew of reason, that *fin*es were contrived in imitation of a similar judicial transaction in the civil law. Cruise's Fines, p. 5.

precise idea of the method of transacting them. It only appears from him, that this proceeding was a final concord made by licence of the king, or his justices^f, in the king's court. But the nature of a fine may be better collected from the more simple manner in which it was originally conducted.

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THE parties having come to an agreement concerning the matters in dispute, and having thereupon mutually sealed a *chirographum*, containing the terms of their agreement, used to come into the king's court in person, or by attorney, and there recognize the concord before the justices: it was thereupon, after payment of a fine, enrolled immediately, and a counterpart delivered to each of the parties^g. This was the most antient way of passing a fine. In course of time, fines came to be passed with a *chirographum*, upon a *placitum* commenced by original writ, as in a writ of covepant, *warrantia charta*, or other writ. When the mutual sealing of a *chirographum* was entirely disused, there still remained a footstep of this ancient practice; for there continues to this day in every fine a *chirograph*, as it is called, which is reputed as essentially necessary to evidence that a fine has been levied.

THE design of *final concords* seems to have been anciently as various as the matters of litigation or agreement among men. By fines were made grants of land in fee, releases, exchanges, partitions, or any convention relating to land, or other rights: in a word, every thing might be transacted by fine which might be done by *chirographum*^h.

THUS far of the two great conveyances in practice for transferring estates of inheritance, namely, *feoffments* and *finer*. The manner in which estates for life or for years (since called *demises*) were made, was in the way of convention or covenantⁱ.

Two other species of conveyance then used were *confirmations* and *releases*. In those unsettled times, when feof-

^f Lib. 8. c. 1.^g Mod. Form. Diff. 14.^h Mod. Form. Diff. 16, 17.ⁱ Ibid. 22.

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fees were frequently disseised upon some suggestion of dormant claims, charters of confirmation were in great request. Many confirmations used to be made by the feoffor to the feoffee, or to his heirs or successors. Tenants in those times hardly thought themselves safe against great lords who were their feoffors, unless they had repeated confirmations from them or their heirs. Releases were as necessary from hostile claimants, as confirmations from feoffors. The words of *confirmation* were *dedi, concessi, or confirmavi*; and such deeds are distinguishable from original feoffments, only by some expressions referring to a former feoffment. *Releases* are known by the words *quertum clamavi, remisit, relaxavi*, and the like.

DURING the time which had elapsed since the Conquest, the Norman law had sufficient opportunity to mix with all parts of our Saxon customs. This change was not confined to the article of tenures, duel, juries, and conveyances. The manner in which justice was administered makes a distinguished part of the new jurisprudence. In the Saxon times, all suits were commenced by the simple act of the plaintiff lodging his complaint with the officer of the court where the cause was to be heard; and this still continued in the county and other inferior courts of the old constitution. But when it had become usual to remove suits out of these inferior courts, or of beginning them more frequently in the king's court; it became necessary to agree upon some settled forms of precepts applicable to the purpose of compelling defendants to answer the charge alleged by plaintiffs. Such a precept was called *breve*; probably, because it contained *briefly* an intimation of the cause of complaint. It was directed to the sheriff of the county where the defendant lived, commanding that he should summon the party to appear in some particular court of the king, there to answer the plaintiff's demand, or to do some other thing tending to satisfy the ends of justice.

Of writs.

THE

THE necessity of such *brevia* was very obvious; for tho', while most suits were transacted in the county court, it was sufficient to enter a plaint with the officer of the court; and the process issuing thereupon being to be executed by the sheriff, who was present, or supposed to be present, in court as judge, was not likely to be extremely illegal or irregular, even when warranted perhaps by nothing more authentic than verbal directions; yet, when suits were commenced in the king's court, at a great distance from the habitation of the parties, and process was to issue to him merely as an officer, who knew nothing more of the matter than what the precept explained, it was necessary that something more particular should be exhibited to him; and therefore, that the precept should be *written*. Hence perhaps it is, that the *brevia* was called also a *writ* *.

THESE *writs* were of different kinds, and received different appellations, according to the object or occasion of them. The distinction between writs furnished a source of curious learning, which led to many of the refinements afterwards introduced into the law. The assigning of a writ of a particular frame and scope to each particular cause of action; the appropriating process of one kind to one action, and of a different kind to another; these and the like distinctions rendered proceedings very nice and complex, and made the conduct of an action a matter of considerable difficulty.

THE cultivation of this kind of learning was encouraged by a regulation of the new law, which was designed for the more useful purpose of preserving the judgments and opinions of judges for the instruction of succeeding ages: this was the practice of entering proceedings of courts upon a roll of parchment, which was then called a *record*.

Of records.

THE practice of registering upon *rotuli*, or rolls of parchment, was entirely Norman; nor did it obtain to any great extent till long after the Conquest. Among the Saxons, the

* We have before seen that deeds, among the Saxons, were called *Gewrite*.
Vid. ant. p. 10.

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manner of registering was by writing on both sides of the leaf; and this was either in some *evangelisterium*, or other monastic book, belonging to a religious house. It was thus, that the memory not only of pleas in courts, but of purchases of land, testaments, and of other public acts, was preserved. This practice, like other Saxon usages, continued long after the invasion of William. We find that Domesday, the most important record of the Exchequer in those times, consists of two large books. But in the time of Henry I. we find *rotuli annales* in the Exchequer for recording articles of charge and discharge, and other matters of account relating to the king's revenue. It is conjectured that the making inrolment of judicial matters in the *curia regis* was posterior in point of time to the same practice in matters of revenue; and was dictated by the experience of its utility in that important department¹. This innovation gave rise to the distinction between *courts of record*, and courts not of record.

A RECORD begun with the entry of the original writ; rehearsed the statement of the demand, the answer or *plea*, the judgment of the court, and execution awarded. Thus a record contained a short history of an action through all its stages. When proceedings were entered in this solemn manner, and submitted to the criticism and exception of the adverse party, it became very material to each that his part of the record should be drawn with all accuracy and precision. When this attention was observed in completing a record, it became a very authentic guide in similar cases. Records were in high estimation; and, as they continued the memorials of judicial opinions, tended to fix the rules and doctrines of our law upon the firm basis of precedent and authority.

SUCH were the more conspicuous parts of the juridical system introduced by the Normans, and such were the changes they underwent during the period that elapsed before the end of the reign of king John.

¹ See Ayliffe's *Antient Charters*, Introd.

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WILLIAM the CONQUEROR to JOHN.

Of Villains—Dower—Alienation—"Nemo potest esse Haeres et Dominus"—Of Descent—Of Testaments—Of Wardship—Marriage—Of Bastardy—Usurers—Of Escheat—Maritagium—Homage—Relief—Aids—Administration of Justice—A Writ of Right—Essoins—Of Summons—Of Attachment—Counting upon the Writ—The Duel—The Assise—Vouching to Warranty—Writ of Right of Advowson—Of Prohibition to the Ecclesiastical Court—The Writ de Nativis—Writ of Right of Dower—Dower unde Nihil.

IN the former chapter it was endeavoured to trace the history of the principal changes made in the law from the time of William the Conqueror down to the reign of king John; but the object of this work being to give a correct idea of the origin and progress of our whole judicial polity, something more satisfactory will be expected than the foregoing deduction. It will be required to state fully, and at length, what was the condition of persons and property; how justice, both civil and criminal, was administered; with the process, proceeding, and judgments of courts; in short, to give a kind of treatise of the old jurisprudence, with a precision, and from an authority, that will at once instruct the curious, and have weight with the learned. When this is done, it will be a foundation on which the superstructure of our juridical history may be raised with confidence; every modification, and addition, being pursued in the order in which it arose, the connexion and dependence of the several parts will be viewed in a new

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light; and the reason and grounds of the law be investigated and explained more naturally, and, it is trusted, with more success than in any discourse, or desultory comment upon our antient statutes, however copious and learned.

In order to lay this foundation of the subsequent History, it seems, that some point of time during the period between the Conquest and the reign of king John should be chosen, and that the contemporary law of that time, in all its branches, should be stated with precision and minuteness. The laws of Edward the Confessor, considered, according to the present opinion, as a performance of some writer in the reign of William Rufus, and the laws of Henry I. are the earliest documents that could at all be viewed with any hopes of information of this kind; but these throw so little light on the Norman jurisprudence, that they furnished small assistance, even in the historical sketch contained in the preceding chapter. The new jurisprudence seems not to have been thoroughly established, or at least tolerably explained, till the reign of Henry II. when we meet with the treatise of Glanville. The method, scope, and extent of this venerable book mark the reign of Henry II. as the most favourable period for our purpose. As, therefore, it may be collected with considerable accuracy from that author, what the law was towards the end of the reign of Henry II. we shall, with his aid, take a complete view of it; and, having done that, we shall proceed with more confidence to consider the subsequent changes made by parliament and by courts in the reigns of Henry III. Edward I. and his successors, as to an enquiry that may be followed with ease, instruction, and delight. This account of our laws at the close of Henry II.'s reign will be divided into the rights of persons, the rights of things, and the proceedings of courts. We shall begin with the first.

The people, as among the Saxons, were divided into freemen and slaves; though the latter assumed under the Norman polity a new appellation, and were called *villani*, or *villains*.

OF villains, those were called *nativi* who were such à *nativitate*; as when one was descended from a father and mother who were both villains à *nativitate*. If a freeman married a woman who was born a villain, and so held an estate in villenage, in her right, as long as he was bound to the villain services due on account of such tenure, he lost, *ipso facto*, his *lex terræ*, as a villain à *nativitate*. If children were born from a father who was *nativus* to one lord, and a mother who was *netiva* to another lord, such children were to be divided proportionably between the two lords^a.

A VILLAIN might obtain his freedom in several different ways. The lord might quit-claim him from him and his heirs for ever; or might give or sell him to some one, in order to be made free: though it should be observed, that a villain could not purchase his freedom with his own money; for he might in such case, notwithstanding the supposed purchase, be claimed as a villain by his lord; for all the goods and chattels of one who was a *nativus* were understood to be in the power of his lord, so as that he could have no money, which could be called his own, to lay out in a redemption of his villenage. However, if some stranger had bought his freedom for him, the villain might maintain such purchased freedom against his lord; for it was a rule, that where any one quit-claimed a villain *nativus* from him and his heirs, or sold him to some stranger, the party who had so obtained his freedom, if he could establish it by a charter, or some other legal proof, might defend himself against any claims of his lord and his heirs: he might defend his freedom in court by duel, if any one called it in question, and he had a proper witness who heard and saw the manumission. But though a man could make his villain *nativus* free, as far as concerned *his* claim, and that of his heirs, he could not put him in a condition to be considered as such by others; for if such a freed man was produced

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^a Glanv. lib. 5. c. 6.

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in court against a stranger to deraign a cause (that is, to be the champion to prove the matter in question), or to make his law^b, or law-wager, as it has since been called, and it was objected to him that he was born in villenage, the objection was held a just cause to disqualify him for those judicial acts; nor could the original stain, says Glanville, be obliterated, though he had since been made a knight. Again, a villain *à nativitate* would become *ipso facto* free, if he had remained a year and a day in any privileged town, and was received into their *gylde* (or guild, as it has since been called) as a citizen of the place^c.

NOTHING is said by Glanville concerning the different ranks of freemen; we shall therefore proceed to the next object of consideration, which is, the right to property claimed by individuals under various titles and circumstances; as *dos*, or dower, belonging to a widow, *maritagium*, and the like; after which we shall speak more particularly about succession to lands, and the nature of tenures, as the law stood in the reign of Henry II.

Dower.

THE term *dos*, or dower, had two senses. In the common and usual sense, it signified that property which a free-man gave to his wife *ad osium ecclesie*, at the time of the espousals. We shall first speak of *dos* in this sense of it. When a person endowed his wife, he either named the dower specially, or did not. If he did not name it specially, the dower was understood, by law, to be the third part of the husband's *liberum tenementum*; for the rule was, that a reasonable dower of a woman should be a third part of her husband's freehold which he had at the time of the espousals, and was seised of in demesne. If he named the dower specially, and it amounted to more than the third, such special dower was not allowed, but it was to be admeasured to a fair third; for, though the law permitted a man to give less than a third in dower, it would not suffer him to give more^d.

^b *Legem facere*.^c Glanv. lib. 5. c. 5.^d Ibid. lib. 6. c. 1.

If a man had but a small freehold at the time of the espousals when he endowed his wife, he might afterwards augment it to a third part, out of purchases he had made since; but if there had been no provisional mention of new purchases at the time of such assignment of dower, although the husband had then but a small portion of freehold, and had made great acquisitions since, the widow could not claim more than the third part of the land he had at the time of the espousals. In like manner, if a person had no land and endowed his wife with chattels, money, or other things, and afterwards made great acquisitions in land, she could not claim any dower in such acquisitions; for it was a general rule, that where dower was specially assigned to a woman *ad ostium ecclesie*, she could not demand more than what was then and there assigned^d.

A WOMAN could make no disposal of her dower during her husband's life; but as a wife was considered *in potestate viri*, it was thought proper that her dower and the rest of her property should be as completely in his power to dispose of them; and therefore every married man, in his lifetime, might give, or sell, or alien in any way whatsoever, his wife's dower; and the wife was obliged to conform in this, as in all other instances, to his will. It is, however, laid down by Glanville, that this assent might be withheld: and if, notwithstanding this solemn declaration of her dissent^e and disapprobation, her dower was sold, she might claim it at law after her husband's death; and, upon proof of her dissent, she could recover it against the purchaser^f. Besides, it must be remarked, that the heir in such case was bound to deliver to the widow the specific dower assigned her, if he could; and if he could not procure the identical land, he was to give her a reasonable *excambium*,

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^d Glanv. lib. 6. c. 2.

^e The word used by Glanville is *contradicere*, which, in this and other places, he seems to use in a sense

implying something more formal and solemn than a common dissent and disapprobation,

^f Glanv. lib. 6. c. 2.

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as it was called, or recompence in value; and if he delivered her the land that was sold, he was in like manner bound to give a recompence to the purchaser². If the assignment at the church-door was in these words, "*Do tibi terram istam cum omnibus pertinentiis*," and he had no appurtenances in his demesne at the time of the espousals, but he either recovered by judgment, or in some other lawful way acquired such appurtenances; the wife might, after his death, demand them in right of her dower³.

If there was no special assignment of dower, the widow was entitled, as we before said, to the third part of all the freehold which her husband had in demesne the day of the espousals, complete and undiminished, with its appurtenances, lands, tenements, and advowsons; so that should there be only one church, and that should become vacant in the widow's life-time, the heir could not present a parson without her consent. The capital messuage was always exempt from the claim of dower, and was to remain whole and undivided; nor were such lands to be brought into the division for dower, which other women held in dower upon a prior endowment. Again, if there were two or more manors, the capital manor, like the capital messuage, was to be exempted, and the widow was to be satisfied with other lands. It was a rule, that the assignment of dower should not be delayed on account of the heir being within age.

If land was specially assigned for dower *ad ositium ecclesie*, and a church was afterwards built within the fee, the widow was to have the free presentation thereof; so as, upon a vacancy, to give it to a clerk, but not to a college, because that would be depriving the heir of his right for ever; however, should the husband in his life-time have presented a clerk, the presentee was to enjoy it during his life, though the presentation was made after the wife had

² Glanv. lib. 6. c. 13.

³ Ibid. c. 22.

been endowed of the land, and it might look like an anticipation and infringement of the profits and advantage to which she was entitled by her special assignment of dower. Yet, should the husband himself have given it to a religious house, as this would be an injury to the wife similar to that above stated respecting the heir, the church after his death was to be delivered back to the widow, that she might have free presentation to it; but after her death, and that of her clerk, the church would return back to the religious house to be possessed for ever.

IF a woman had been separated from her husband *ob aliquam sui corporis turpitudinem*, or on account of blood and consanguinity, she could not claim her dower; and yet in both these cases the children of the marriage were considered as legitimate, and inheritable to their father. Sometimes a son and heir married a woman *ex consensu patris*, and gave her in dower some part of his father's land, by the assignment of the father himself. Glanville states a doubt upon this; whether in this case, any more than in that of an assignment by the husband himself, the widow could demand more than the particular land assigned; and whether, upon the death of the husband before the father, she could recover the land, and the father be bound to warrant her in the possession of it?

THUS far of one sense of the word *dos*. It was understood differently in the Roman law, where it properly signified the portion which was given with the woman to her husband; which corresponds with what was commonly called in our law *maritagium*: but we shall defer saying any thing of *maritagium* till we have considered the nature of alienation and descent, with some other properties of land.

RESPECTING the alienation of land, the first consideration that presents itself, is the indulgence allowed in favor of

¹ Glanv. lib. 6. c. 17.

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gifts *in maritagium*. Every freeman, says Glanville, might give part of his land with his daughter, or with any other woman, *in maritagium*, whether he had an heir or not, and whether his heir agreed to it or not; nay, though he made that solemn declaration of his dissent, which, we have just seen, had the effect of rendering an alienation of dower ineffectual and void^k. A person might give part of his freehold *in remunerationem servi sui*, or to a religious place in free alms; so that, should such donation be followed by feisin, the land would remain to the donee and his heirs for ever, if an estate of that extent had been expressed by the donor; But if the gift was not followed by feisin, nothing could be recovered against the heir without his consent: for such an incomplete gift was considered by the law rather as a *nuda promissio* than a real donation. Thus then, on the above occasions, any one might, in his lifetime, give a reasonable part of his land to whomsoever he pleased; but the same permission was not granted to any one *in extremis*; lest men, wrought upon by a sudden impulse, at a time when they could not be supposed to have full possession of their reason, should make distributions of their inheritances highly detrimental to the interest and welfare of tenures. The presumption, therefore, of law in case of such gifts was, that the party was insane, and that the act was the result of such insanity, and not of cool deliberation. However, according to Glanville, even a gift made *in ultimâ voluntate* was good, if assented to and confirmed by the heir^l.

In the alienation of land some distinctions were made between *hereditas* and *quæstus*, land descended as an inheritance, and land acquired by purchase. If it was an inheritance, he might, as was said, give it to any of the before-mentioned purposes. But, on the other hand, if he had more sons than one who were *mulieratos*, that is, born in

^k Glanv. lib. 7. c. 1.

^l Ibid.

wedlock, he could not give any part of the inheritance to a younger son against the consent of the heir; for it might then happen, from the partiality often felt by parents towards their younger children, that, to enrich them, the eldest would be stripped of the inheritance. It was a question whether a person, having a lawful heir, might give part of the inheritance to a bastard-son; for if he could, a bastard would be in better condition than a younger son born in wedlock; and yet it should seem that the law allowed such donation to a bastard son.

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If the person who wanted to make a donation was possessed only of land by *purchase*, he might make a gift, but not of all his purchased land; for he was not, even in this case, allowed intirely to disinherit his son and heir: tho' if he had no heir male or female of his own body, he might give all his purchased lands for ever; and if he gave seisin thereof in his life-time, no remote heir could invalidate the gift. Thus a man, in some cases, might give away, in his life-time, all the land which he had himself purchased, but not, as in the civil law, make such donee his heir; for, says Glanville, *solus Deus hæredem facere potest, non homo.*

If a man had lands both by inheritance and by purchase, then he might give all his purchased land to whomsoever he pleased, and afterwards might dispose of his lands by inheritance, in a reasonable way, as before stated. If a person had lands in free soccage, and had more sons than one, who by law should inherit by equal portions, the father could not give to one of them, either out of lands purchased or inherited, more than that reasonable part which would belong to him by descent of his father's inheritance: but the father might give him his share.

We may here observe, that many questions of law arose, owing to certain consequences which sometimes resulted from this liberality of fathers towards their children. First, suppose a knight, or freeman, having four

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four or more sons, all born of one mother, gave to his second son, to him and his heirs, a certain reasonable part of his inheritance, with the consent of the eldest son and heir (to avoid all objections to the gift), and seisin was had thereof by the son, who received the profits during his life, and died in such seisin, leaving behind him his father and all his brothers alive; there was a great doubt among lawyers, in Glanville's time, who was the person by law entitled to succeed. The father contended, he was to retain to himself the seisin of his deceased son, thinking nothing more reasonable than that the land which was disposed of by his donation, should revert again to him. To this it might be answered by the eldest son, that the father's claim could not be supported; for it was a rule of law, *quod nemo ejusdem tenementi simul potest esse hæres et dominus*^m, that no one could be both heir and lord of the same land: and by the force of the same rule, the third son would deny that the land could revert to the eldest; for as he was heir to the whole inheritance, he could not, as before said, be at once heir and lord; for he would become lord of the whole inheritance upon the death of his father, and therefore stood very nearly in the predicament in which we just stated the father himself to be. Thus, as by law the land could not remain with him, there was no reason, says Glanville, why he should recover it; and therefore, by the same reasoning, it appeared to Glanville, that the third son was to exclude all the other claimants.

A LIKE doubt arose, when a brother gave to his younger brother and his heirs a part of his land, and the younger brother died without heirs of his body; upon which the

^m In the times of Glanville and Bracton, the reservation of services might be made either to the lord, or to the lord of whom the feoffee held; they seem, more commonly to have been made in the former manner: thus every fresh new feoff-

ment in fee made a new tenure, and of course created a new manor; and so the law continued till that *quæsi-empore*, 13. Ed. 1. required feoffments in fee to be made with reservation of the services to the chief lord.

elder took the land into his hands, as being vacant and within his fee, against whom his own two sons prayed an assise of the death of their uncle; in which plea the eldest son might plead against the father, and the younger son against his elder brother, as before mentioned. And here the law is stated by Glanville to be this: that the father could not by any means retain the land, because he could not *simul hæres esse et dominus*; nor could it revert to the donor, with the homage necessarily incident to it, if the donee had any heir, either of his body or more remote. Again, land thus given, like other inheritances, naturally descended to the heir, but never ascended: from all which it followed, that the plea as between the father and eldest son was at an end, as having no question in it; but that between the eldest and younger son went on, as before stated. And in this last case the king's court had taken upon it to determine, *ex æquitate*, that the land so given should remain to the eldest son (particularly if he had no other fee) to hold till the paternal inheritance descended upon him; for while he was not yet lord of his paternal inheritance, the rule *quid nemo ejusdem tenementi simul potest hæres esse et dominus*, could not be said to stand in the way. But then it might be asked, whether, when he became by succession lord of that part of the inheritance, he was not heir also of it, as well as of the rest of the inheritance, and then fell within the meaning of that rule? To this Glanville answers, that it was a thing not at first certain, whether the eldest son would be the heir, or not; for should the father die first, he most undoubtedly would be so; and then he would cease to be lawful owner of the land he had acquired by succession from the uncle, and it would revert to the younger son as right heir: yet if, on the other hand, the eldest son died first, then it was plain he was to be the heir of the father; and therefore those two requisites of this rule, namely, the *jus hereditarium* and *dominium*, did not concur in the same person. Such is the reasoning of

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CHAP. III. Glanville upon this curious point, in the law of descent,
as understood in his time^b.

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THERE are two observations to be made respecting gifts of land, and then we shall proceed to consider the law of descent more fully. One is, that bishops and abbots, whose baronies were held by the eleemosynary gift of the king and his ancestors, could not make gifts of any part of their demesnes, without the assent and confirmation of the king^c: the other is, that the heirs of a donor were bound to warrant to the donee and his heirs the donation, and the thing thereby given^d.

Of descent:

HAVING incidentally alluded to some rules which governed the descent of lands, it will now be proper to treat of the law of succession more at large. They divided heirs into those they called *proximi*, and those they considered as *remotiores*. *Proximi* were those begotten from the body, as sons and daughters: upon the failure of these, the *remotiores* were called in, as the *nepos* or *neptis*, the grandson or grand-daughter, and so on, descending in a right line in *infinitum*; then the brother and sister, and their descendants; then the *avunculus*^e, or uncle, as well on the part of the father as of the mother; and in like manner the *matrtera*, or aunt; and their descendants. When therefore a person died leaving an inheritance, and having one son, it was a settled thing that the son succeeded to the whole. If he left more sons than one, then there was a difference between the case of a knight; that is, a tenant by *feodum militare*, or knight's service; and a *liber sokemannus*, or free sokeman. If he was a knight or tenant by military service, then, according to the law of England, the eldest son succeeded to the father in *totum*; and none of his brothers had any claim whatsoever. But if he was a free sokeman,

^a Glanv. lib. 7. c. 1.

^b Ibid.

^c Ibid. c. 1.

^d This is the expression used by Glanville; which is not strictly cor-

rect; *avunculus* and *matrtera* being the uncle and aunt on the mother's side; or the uncle on the father's side was *pater*. Indeed our author, after all, passes over this in a loose way.

and possessed of soccage-land that had been anciently divisible, then the inheritance was divided among all the sons by equal parts; saving always to the eldest son, as a mark of distinction, the capital messuage; so, however, as he made a proportionate satisfaction to the other brothers on that account. But if the land was not anciently divisible, then it was the custom, in some places, for the eldest son to take the whole inheritance; in some, the youngest son.

If a person left only a daughter, then what we have said of a son held good with regard to her. And it was a general rule, whether the father was a knight or a sokeman, that where there were more daughters than one, the inheritance should be divided among them; saving, however, (as in the case of the son) the capital messuage to the eldest daughter. Where the inheritance was thus divisible between brothers or sisters, if one of them died without heirs of the body, the share of the party deceased was divided amongst the survivors. It was a rule, in these divisible inheritances, that the husband of the eldest daughter should do homage to the chief lord for the whole fee; the other daughters or their husbands being bound to do their services to the chief lord by the hand of the eldest, or her husband; and not to do homage or fealty to the husband of the eldest: nor were their heirs in the first or second descent; but those in the third descent from the younger daughters were bound by the law of the realm to do homage and pay a reasonable relief to the heir of the eldest daughter for their tenement. It was a rule, that no husbands should give away their wives' inheritance, or any part thereof, without the assent of their heirs; nor could they release any right that might belong to their heirs.

We have said before, that if a person had a son and daughter, or daughters, the son succeeded *in totum*; and therefore, if a man had more wives than one, and had daughters from two, and at length a son from a third, this son would alone take the whole inheritance of his father;

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for it was a general rule, that a woman could never take part of an inheritance with a man¹, unless, perhaps, by the particular and ancient customs of some cities or towns: yet if a man had more wives than one, and had daughters from each, they all succeeded alike to the inheritance, the same as if they had been born of the same mother.

SUPPOSE a man died without leaving a son or a daughter, but had grandchildren; they succeeded in like manner as children; those in the right line being always preferred to those in the transverse. However, we have before seen², that when a man left a younger son, and a grandson of his eldest son, who was dead, there was great difficulty in determining the succession in such case between the son and grandson. Some thought the younger son was more properly the right heir than the grandson; for the eldest son not having lived till he became heir, the younger son, by outliving both his brother and father, ought properly to be the father's successor. It seemed to others, that the grandson should be preferred to the uncle; for as he was heir of the body of the eldest son, and, if he had lived, would have had all his father's rights, he, it was said, should more properly succeed in the place of his father: and so Glanville thought, provided the eldest son had not been *foris-familiated* by the grandfather. A son was said to be *foris-familiated*, if his father assigned him part of his land, and gave him seisin thereof, and did this at the request, or with the free consent of the son himself, who expressed himself satisfied with such portion; and it was clear law, that in such case the heirs of the son could not demand as against their uncle, or any one else, any more of the inheritance of the grandfather than what was so assigned to their father; though the father himself, had he survived the grandfather, might notwithstanding have claimed more. Where it happened, however, that the

¹ Glanville's words are, *mulier non
 gaudet cum masculo partem capere in hereditate aliqua.*

² Vid. ant. 41.

eldest son had in his father's life-time done homage to the chief lord of the fee for his father's inheritance, as was not unfrequently the case, and died before his father, there it was held beyond question, that the son of such eldest son should be preferred to the uncle, although there had been no foris-familiatio.

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SUCH was the law of descent in Glanville's time ; and this will very properly be followed by a short view of some of the duties incumbent on heirs ; with the incidents of inheritance and succession ; such as testaments, wardship, bastardy, and escheat.

HEIRS, says Glanville, were bound to observe the testaments made by their fathers, or their other ancestors to whom they were heirs, and to pay all their debts. For every freeman, not incumbered with debts beyond the amount of his effects, might, on his death-bed, make a reasonable division of his property, by will ; so as he complied with the customs of the place where he lived ; one of which commonly was, first, to remember his lord by his best and principal chattel ; then the church ; and after these, he might dispose of the remainder as he pleased. However the customs of particular places might lay this restriction upon wills, no person was bound, by the general law of the kingdom, to leave any thing by will to any particular person, but was at liberty to act as he pleased ; it being a rule of law, that *ultima voluntas esset libera*. A woman who was *sui juris* might make a will ; but if she was married, she could do nothing of this sort without her husband's authority, as it would be making a will of his goods. But Glanville thought it would be a proper testimony of affection and tenderness, for a husband to give to his wife *rationabilem portionem*, that is, a third part of his effects ; this being what she would be intitled to, if she had survived him ; and it seems that it was not unfrequent for husbands to give a sort of property to their wives in this third part, even during the coverture.

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THE passage in Glanville from which this and the following account of testaments is taken, throws great obscurity upon the subject, and lays a foundation for the doubt that long divided lawyers, and is not yet settled, respecting the power of making wills of chattels, at common law. After having expressly laid down, that, by the general law of the kingdom, no person was bound to leave any thing by will to any particular person, and that the third part left to the wife was dictated rather by a moral than legal obligation, he goes on in the following remarkable words: "When a person, says he, is about to make his will, if he has more than enough to pay his debts, then all his moveables shall be divided into three equal parts; of which one shall go to the heir, another to the wife; the third be reserved to himself, over which he has the power of disposal as he pleases: if he dies without leaving a wife, a half is to be reserved to the testator." Thus far respecting the law of testaments for the disposition of moveables; to which he adds, conformably with what we have before shewn, that an inheritance could not be given by last will^a.

A TESTAMENT ought to be made in the presence of two or more lawful men, either clergy or lay, being such persons as might afterwards become proper witnesses thereto. The executors of a testament were such persons as the testator chose to appoint to undertake the charge of it. If the testator appointed none, the *proximi et consanguinei*, by which were meant, as may be supposed, the nearest of kin to the deceased, might interpose; and if there was any one, whether the heir or a stranger, who detained any effects of the deceased, such executors or next of kin might have the following writ directed to the sheriff, to cause a reasonable division of the effects to be made:

The progress of this doctrine, and the discussions upon it, will be related in the proper place.

^a Glanv. lib. 7. c. 5.

*rex vicecomiti salutem : præcipio tibi quòd jussu et sine dilatione
 facias stare rationabilem divisiõem N. sicut rationabiliter man-
 dari poterit quòd eam fecerit, et quòd ipsa stare debeat, &c.*.*
 If the person, summoned by authority of this writ, said any
 thing against the validity of the testament; that it was
 not properly made, or that the thing demanded was not
 bequeathed by it; such inquiry was to be heard and deter-
 mined in the court christian; for all pleas of testaments,
 says Glanville, belong to the ecclesiastical judge, and are
 there decided upon by the testimony of those who were
 present at the making of the will*.

If a person was incumbered with debts, he could not
 make any disposition of his effects (except it was for pay-
 ment of his debts) without the consent of the heir; but if
 there was any thing remaining over and above the payment
 of his debts, that residue was to be divided into three parts,
 as above mentioned; and he might, says Glanville, make
 his will of the third part. Should the effects of the deceased
 not be sufficient to pay his debts, the heir was bound to
 make up the deficiency out of the inheritance which came
 to him; so that we see the reason why, under such circum-
 stances, the heir's consent was necessary towards a will. It
 seems, however, that the heir was not bound to make up
 his deficiency, unless he was of age†.

HEIRS were considered in different lights, according as
 they were of full age, or not. An heir of full age might
 hold himself in possession of the inheritance immediately
 upon the death of the ancestor; and the lord, though he
 might take the fee together with the heir into his hands,
 was to do it with such moderation, as not to cause any dis-
 satisfaction to the heir; for the heir might resist any violence,
 provided he was ready to pay his relief and do the other
 services. Where the heir to a tenant holding by military
 service was under age, he was to be in custody of his

Of wardship.

* Glanv. lib. 7. c. 6, 7.

† Ibid. c. 5.

‡ Ibid.

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lord till he attained his full age; which, in such tenure, was when he had completed the twenty-first year. The son and heir of a sokeman was considered as of age when he had completed his fifteenth year: the son of a burgess, or one holding in burgage tenure, was esteemed of age, says Glanville, when he could count money and measure cloth, and do all his father's business with skill and readiness. The lord, when he had custody of the son and heir, and of his fee, had thereby, to a certain degree, the full disposal thereof; that is, he might, during the custody, present to churches, have the marriage of women, and take all other profits and incidents which belonged to the minor and his estate, the same as he might in his own; only he could make no alienation which would affect the inheritance. The heir was, in the mean time, to be maintained with a provision suitable to his estate; the debts of the deceased were to be paid in proportion to the estate and time it was in custody of the lord, who was not by such liens to be entirely deprived of his benefit by the custody: with that qualification, however, lords were bound *de jure* to answer for debts of the ancestor.

THE lord also, as he had all emoluments belonging to the heir, was to act in all his concerns, and prosecute all suits for recovery of his rights, where such suits were not delayed by the usual exception to the infancy of the party. But the lord was not bound to answer for the heir, neither upon a question of right, or of feisin, except only in one case; and that was, where there had fallen to the heir, since his father's death, the custody of some minor: for then, if the minor came of age, and the inheritance was not delivered to him, he was intitled to have an assize and recognition *de morte antecessoris*: and in this case, as the recognition was not by law to remain, on account of the infancy of the heir, his lord was to answer for him. If a minor was appealed of felony, he was to be attached by safe and sure pledges; but yet he was not bound to answer to the

the appeal till he was of age^a. It was the duty of those who had the custody of heirs and their fees, to restore the inheritance to the heir in good condition, and also free from debts; in proportion, as was before said, to the size of the inheritance, and to the time it was in custody^a. If there was any doubt whether an heir was of age or not, yet still the lord had the custody of the heir and his estate until he was proved to be of age by lawful men of the vicinage, upon their oaths.

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If an heir within age had more lords than one, the chief lord, that is, he to whom he owed allegiance for his first fee, was to have the preference of the custody: an heir, however, so circumstanced, was still to pay to the lords of his other fees their reliefs, and other services. In the case of a holding of the king *in capite*, the custody belonged to the king completely and fully, whether the heir held of other lords or not: for the maxim was, *dominus rex nullum habere potest parem, multò minùs superiorem*. But in burgage-tenure the king had not this preference to other lords. The king might commit to any one such custodies as belonged to him; and they were committed sometimes *pleno jure*, and sometimes not. In the latter case, the committee was to render an account thereof at the exchequer; in the former, not: in the former case, he might present to churches, and do other acts, as he might in his own estate^b.

THIS was the law concerning the custody of heirs, in military tenure. The heirs of *sokemen*, upon the death of their ancestors, were, according to Glanville, to be in the custody of their *consanguinei propinqui*, which must mean, as in a former passage, the next of kin; with this qualification, that if the inheritance descended *ex parte patris*, the custody belonged to the descendants *ex parte matris*; and so *vice versa*. For the opinion was, that the custody of a person should not, by law, belong to one who, standing

^a Glanville, lib. 7. c. 9.

^a Ibid.

^b Ibid. c. 10.

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near the succession, might be suspected of having views upon the inheritance.

WE shall next speak of the custody of *female heirs*. If a woman was a minor, she was to be in the custody of her lord till she became of full age, and then the lord was bound to find her a proper marriage. If there were more than one, he was to deliver to each her reasonable portion of the inheritance. If a woman was of full age, then also she was to be in the custody of her lord till she was married by his advice and disposal; for it was the law and custom of the realm, that no woman who was heir to land should be married but by the disposal and assent of her lord: and this rule operated so far, that if any one married his daughter, who was to be his heiress, without the assent of his lord, he was by strictness of law to be forever deprived of his inheritance; nor could he retain it but by the mercy and pleasure of the lord. Nevertheless, when such a person applied to the lord for licence to marry his daughter, the lord was bound to give his consent, or shew some reasonable cause to the contrary: if not, the father might even proceed to marry her according to his own wish and inclination, without the lord's concurrence.

UPON this subject of marrying women Glanville puts a case: Whether a woman possessed of land in dower might marry as she pleased, without the assent of her *warrantor*, that is, the heir of her husband; and whether by so doing she would lose her whole dower? Some thought she ought not to lose her dower, because such second husband was not by the law and custom of the land bound to do *homage* to the warrantor, but only a simple *fealty*; which was merely, in case the wife should die before the husband, to preserve the homage from being entirely lost, for want of some outward mark of tenure. But, notwithstanding that, Glanville thought she was bound to obtain the assent of

her warrantor, or lose her dower, unless she had other lands, either by *maritagium* or by inheritance; for then it was sufficient if she had the assent of the chief lord: and this was on account of the simple fealty only which the husband was bound to do to the lord. If the inheritance was held of more than one lord, it was sufficient to obtain the assent of the chief lord^a.

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If women, while in custody of their lords, did any thing which was a cause of forfeiture, and this was made out against them in a lawful way, the offender lost her right to the inheritance, and her share accrued to the rest; but if they had all incurred a forfeiture, then the whole inheritance fell to the lord, as an *escheat*.

WIDOWS were not to be again in custody of their warrantors, though, as has been already related, they were to have their assent before they married. Women were not to forfeit their inheritance on account of any incontinence: not that the maxim, *putagium hereditatem non adimit*, meant this indemnity of women in case of incontinence, for that was to be understood of the consideration the law had of a son begotten under such circumstances, and born after lawful wedlock; who was thereby intitled to succeed to the inheritance as a lawful heir; according to another rule, *filius hæres legitimus est, quem nuptiæ demonstrant*^c.

THIS brings us to consider the law of legitimacy. It was held, that no *bastardus*^d, or bastard, was a legitimate or lawful heir, nor any one not born in lawful wedlock. If any one claimed an inheritance as heir, and it was objected that he was not heir, because he was not born in lawful wedlock; then the plea ceased in the king's court, and it was commanded to the archbishop or bishop, whichsoever

Of bastardy.

^a Glouc. lib. 7. c. 12.

^b Ibid.

^c In German *bastard*; from *bas*, says Spelman, which signifies *infamis*, and metaphorically *spurius*, im-

purus; and *bast*, which signifies *ortus*, or *editus*. So we say in English *upstart*; as it were, *subito exortus*. Vid. Spelm. voce *Bastardus*.

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it might be, to make enquiry of the marriage, and to signify to the king, or his justices, his judgment thereon; for which purpose there issued a writ to the following effect: *Rex episcopo salutem: Veniens coram me W. in curiâ meâ petit versus R. fratrem suum quartam partem fœdâ unius militis in villâ, &c. sicut jus suum; et in quo idem R. jus non habet, ut W. dicit, eò quòd ipse bastardus sit, natus ante matrimonium matris ipsorum. Et quoniam ad curiam meam non spectat agnoscere de bastardiâ, vos ad vos mitto, mandans ut in curiâ christianitatis inde faciatis quod ad vos spectat. Et cum loquel. debitu coram vobis finem sortita fuerit, mibi literis vestris significetis, quid inde coram vobis actum fuerit, &c. &c.*

UPON the subject of legitimacy, there was this curious question: If a person was born before his father married his mother, whether, after the marriage, such child was to be considered as a lawful heir? And Glanville says, that tho' by the canons and Roman law (meaning a law of Justinian adopted in a constitution made in the time of Pope Alexander III. about thirty years before) such a child was a lawful heir; yet by the law and custom of this realm he was not to be received as an heir, to hold or claim any inheritance. The question, whether born before or after marriage, we have seen, was examined before the ecclesiastical judge, whose judgment was to be reported to the king or his justices; but when the spiritual judge had certified the answer to that question, the king's court made use of it as it pleased, and denied or adjudged the inheritance in dispute to either party, according to its own rule of determination: so that the ecclesiastical court only answered whether the party was born before or after marriage; the king's court determined *who* was heir^a.

As a bastard could have no heir but of his body, this gave occasion to a very particular question of inheritance and succession. If a person made a gift of land to a bastard,

^a Glanv. lib. 7. c. 13, 14.

^b Ibid. c. 15.

reserving a service or any thing else, and received homage, and the bastard died in seisin of the land, without leaving any heir of his body, it was a doubt in Glanville's time, who was to succeed to the land; it being clearly held that the lord could not; though it was determined, that if a bastard died without a will, his goods went to his lord; and if he held of more than one, each was to take that which was found within his fee ^l.

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It may be remarked here, that all the effects of an usurer, whether he made a will or not, belonged to the king: this was meant as a penalty upon usury, after the death of the party; for in his life-time he could not be proceeded against criminally. Among other inquisitions which used to be made for the king, one used to be made of a person dying in this offence (for so it was called) by twelve lawful men of the vicinage, upon their oaths: and if it was proved, all the moveables and chattels of the deceased usurer were taken for the king's use; his heir was disinherited; and the land reverted to the lord. If a person had been notoriously guilty of usury, but had desisted from the practice, and died a penitent, his property was not to be treated as the property of an usurer. The point therefore was, whether a man died an usurer; and only in such case could his effects be confiscated ^k.

Usurers.

To finish the subject of descent to heirs; it must be remarked, that next after those we have mentioned, the *ultimus heres*, if he could be so called, of every man was his lord: for when a person died without a certain heir ^l, the

Of escheat.

^l Glanv. lib. 7. 16.

^k Ibid.

^l This law of *ultimus heres*, laid down so generally by Glanville, is said by himself, just before, not to take place where a bastard died without heirs of his body. The reason of this exception to the analogy of tenures does not appear. In cases of forfeiture where the goods even went to the king, yet the land escheated to the lord. We shall see, that in the times of Bracton, the land, in this

case of bastardy, escheated to the lord, and so it does at this day.

It is worthy of remark, that in Scotland, where feudal rights were in general more regarded than in England, the lord has long been deprived of this casualty; and the king is considered as the *ultimus heres* not only of the bastard, but in all cases of failure of heirs; upon the principle, *quod nullius est, credit domino regi*. 2, Blackst. 249. Ersk. Prin. b. 3. tit. 10.

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lord of the fee might, of right, take into his hands and retain the fee, whether such lord was the king or any other person. Nevertheless, should any one afterwards come and say he was the right heir, he might, either by the grace of the lord, or at least by the king's writ, be let in to sue for the inheritance, and make his claim out in court; yet, in the mean time, the land remained in the lord's hands; it being a rule, that when a lord had any doubt about the true heir to his tenant, he might hold the land till that was made out in due form of law. This was like what we have seen was done, when there was a doubt whether an heir was of age or not; with this difference, that in this case the land, in the mean time, was considered as an escheat, which was to all intents and purposes the absolute property of the lord; in the other, it was not looked upon as his own, but only as *de custodia*.

LANDS reverted to the lord by escheat, not only on failure of heirs, but by various causes of *forfeiture*. If any one was convicted of felony, or confessed it in court, he lost his inheritance by the law of the land, and it went to his lord as an escheat. Where a person held of the king *in capite*, in such case, as well his land as his moveables and chattels, wherever they were found, were taken for the king's use. Again, if an outlaw, or one convicted of felony, held of any one but the king, then also all his moveables belonged to the king, and his land was to remain in the king's hands for a year; but at the expiration of that time, it was to revert to the lord of the fee: this, however, was *cum domorum subversione et arborum extirpatione*, that is, according to the barbarous and unwise policy of those days, not till the king had first subverted all the houses, and extirpated all the trees thereon.

In short, when a judgment passed in court, that a man should be *exheredatus*, his inheritance reverted to the lord of the fee, as an escheat. If any one was condemned for theft, his moveables and chattels went to the sheriff of the county;

county; but the lord of the fee took the land without waiting the year, as in the former case, because theft was not an offence against the king's crown, as robbery and homicide were. When any one was regularly and legally outlawed, he forfeited his lands; and tho' he was afterwards restored by the king's pardon, neither he nor his heirs could, by reason of such pardon, recover the land once forfeited, against the lord; for, notwithstanding the king remitted the pains of forfeiture and outlawry as far as regarded himself, he could not thereby infringe the rights of others^m.

It was to illustrate the title of *maritagium*, that we were at first led into this long digression about the law of descent, legitimacy, and escheat: to that we now return; and shall conclude what is to be said upon it, by speaking of the tenure by which a tenant *in maritagio* held his estate.

MARITAGIUM was of two kinds: one was called *liberum*, or free; the other, *servitio obnoxium*, liable to the usual services. *Liberum maritagium* was when a freeman gave part of his land with a woman in marriage, quit and freed from him and his heirs of all service towards the chief lord. Land so given enjoyed this immunity as low down as to the third heir; and during that time no homage was to be done: but after the third heir was dead, the land became subject to its old services, and homage was again to be done for it. If land was given *in maritagium servitio obnoxium*, that is, with a reservation of the legal services; in that case, the husband of the woman and his heirs down to the third were to perform that service, but yet without doing any homage; but the third heir, says Glanville, was to do homage for the first time, and so were all his heirs for ever after; tho', in case of *liberum maritagium*, we have seen that homage was not to be done till after the third heir was dead. In all these cases, however, where no homage was done, yet a fealty was to be performed by the woman and her heirs, either by solemn promise or by

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^m Glanv. lib. 7. c. 17.

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oath, almost in the same form and words in which homage was done.

WHEN a man having land given him *in maritagium* with a woman, had by that woman an heir born, whether male or female, who was heard to cry within four walls, *clamantem et auditum infra quatuor parietes*, as they expressed it, and survived his wife; then, whether the heir lived or not, the *maritagium* remained to the husband during his life, and after his death reverted to the donor or his heirs: but if he had no heir of his wife, then the *maritagium* reverted to the donor or his heirs, immediately upon her death. And this was a sort of reason why homage was not usually received for these *maritagia*. For when land was given in any way, and homage was received for it, the effect of homage was such that the land could not, by law, return to the donor or his heirs; which would be contrary to the intention of these gifts *in maritagium*. If the woman who had land thus given *in maritagium* had survived her husband, and married a second, the law was the same as to his retaining the land in case he survived, whether the first husband left an heir or not^a.

If land was to be claimed either by the wife or her heir, as having been given *in maritagium*, there was a difference between such a claim when against the donor and his heirs, and when against a stranger. If it was against the donor and his heirs, then it might be in the election of the demandant to sue in the court christian, or in the secular court. For questions of *maritagium* were considered as belonging to the ecclesiastical judge, if the demandant pleased to resort to him, on account of the mutual promises made by the man and woman at the time of the espousals. But if the suit was against a stranger, then it was to be determined in the lay court, in the same way as other suits about lay-tees. It must be observed, that such a suit, like a plea of dower, was not to be conducted without the presence of

^a Glav. lib. 7. c. 18.

the warrantor; and as far as concerned the warrantor, every thing was to be ordered as in an action for dower; all which will be made plain when we come to speak of that proceeding: only this must be remembered, that the third heir, after he had performed his homage, might go on with the suit without the authority of his warrantor^o.

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THE subject of homage and relief deserves further consideration, and will properly enough follow what has just been said. Upon the death of the father or other ancestor, the lord of the fee was to receive the homage of the right heir whether he was of age or not, so as the heir was a male; for women could, by law, do no homage, though they sometimes used to do fealty; yet, when they married, their husbands were to do homage for them, in cases where it was due for the fee they held. If a male heir was a minor, the lord could not have custody of the fee nor of the heir till he had received homage; it being a general rule, that a lord could demand no service, relief, or any thing else from the heir, whether he was of age or not, till he had received homage for the fee in respect of which he claimed such relief or service; and this was on account of the protection the heir could claim of his lord after homage, but not before. A person might do homage to different lords for different fees; but one of these was to be the chief homage, and distinguished above the rest, by being accompanied, says Glanville, with allegiance[†]; which was to be performed to that lord of whom the homager held his chief freehold.

Homage.

HOMAGE was to be done in this way: the person was to profess, that “he became *HOMO domini sui*, the man of “his lord, to bear him faith for the tenement in respect of which he did homage; to preserve his terrene “honour in all things, saving only the faith he owed to the “king and his heirs.” From this it is clear, that it would

* Glanv. lib. 7. c. 18.

† *Cum ligantia factum.*

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be a breach of faith and of homage for a vassal to do any thing to the damage of the lord⁹, unless in his own defence, or at the command of the king, when his lord had taken up arms against his sovereign lord the king: and, in general, it would be a breach of faith and of homage to do any thing *ad exheredationem domini sui, vel dedecus corporis sui*. If then several lords, to each of whom a tenant had done homage, should make war on each other; it was the tenant's duty to obey the commands of his chief lord, and to go with him in person, if he required it, against any of the rest; notwithstanding which, in all other respects, the service owing to such other lords were still to be duly rendered by the tenant. The penalty of doing any thing to the dishonour of a lord, was for the tenant and his heirs to lose, for ever, the fee held of him: the same, if the tenant put violent hands upon him, to hurt or do him any atrocious injury¹.

GLANVILLE makes it a question, whether a tenant could be put to answer in his lord's court for default in any of the above particulars, and whether the lord could *distrain* him, by judgment of his court, without the command of the king or his justices; or without the king's writ, or that of his chief justice. And he thought that the law allowed a lord, by the judgment of his court, to call upon and *distrain* his homager to come to his court; and if the homager could not purge himself against the charge of his lord *tertia manu*, by three persons, or as many more as the court might require, he should be *in misericordia domini* to the amount of the whole fee he held of him. Glanville puts another question; whether a lord could *distrain* his homager to appear in his court to answer for the service of which the lord complained he deformed him, or made default in payment; and he thought that the lord might, without the command of the king or his justices;

⁹ *Dominium suum infirmare.*

¹ Glanv. lib. 9. c. 1.

and that in such a proceeding the lord and his homager might come to the duel, or the great assize, by means of any one of the *pares* who chose to make himself a witness that he had seen the tenant or his ancestors do to the lord and his ancestors the service in dispute, which he was ready to *devaign* or prove; and that if the tenant was in this manner convicted, judgment should be for him to lose the whole fee which he held of the lord. Where a lord found he could not in this manner *justitiare*, or compel his tenant to appear in his court, he was obliged to resort to the process of the *curia regis* *; that is, to the command or writ of the king, or his justices.

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HOMAGE might be done by every freeman, as well those within age as those who were of full age, whether clergy or lay. Yet bishops consecrated could not do homage to the king, though they held their bishoprics as baronies, but only fealty; and this they performed with an oath. It was usual for bishops elect, to do homage before their consecration †.

IT is to be understood, that homage was not a mere personal thing. It was done in respect of some benefit derived from property or possession. It was due in respect of lands, tenements, services, rents in certain, whether in money or other things; but without some of these causes no homage was due to a lord, though it might be due to the king. Again, homage was not due in respect of all lands; for it was not due on account of dower, nor free marriage, nor from the eldest sister on account of the fees of younger sisters, till after the third descent; nor of a fee given in free alms ‡.

HOMAGE might be received by any free man or woman, whether of age or not, as well clergy as lay. If homage had been done to a woman, and she married, it was to be done over again to the husband; yet, in a case somewhat similar, namely, when a person, by a final concord made

* Glanv. lib. 9. c. 1.

† Ibid.

‡ Ibid. c. 2.

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in court, recovered land for which a relief had been paid to the chief lord, it was a question, whether the person recovering was bound to pay a relief, upon his coming into possession thereof*.

In consequence of homage being performed, there arose a mutual relation between the parties; according to the rule, *quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio; præter solam reverentiam*. Therefore, when land was given for the service and homage of the tenant, and any one afterwards instituted a suit for that land, the lord was bound to warrant it to him, or to give him in lieu thereof *competens excambium*, an equivalent in value.

Relief.

WHEN an heir who had been in custody came of age, the inheritance was restored to him without paying a relief; that being remitted in consideration of the profit the lord had derived from the custody. A female heir, whether of age or not, was continued in custody till she was married by the advice of her lord. If she had been within age when she first came into the lord's custody, then upon her marriage the inheritance was quit of all relief; but if she was of age when she first came into the lord's custody, though she continued some time in custody before marriage, yet her husband was to pay a relief upon the marriage; and a relief once paid by the husband, was an acquittal both to husband and wife, during their several lives, for any relief on account of the inheritance: so that neither the wife nor her second husband, if she had one, nor the first husband, should he survive her, could be called upon to pay any relief†.

If the male heir was of age when his ancestor died, and was well known to be the heir, he might hold himself in the inheritance even against the will of the lord, as we before said; provided he made a tender of his homage, and a reasonable relief, in the presence of credible persons. The

* Glanv. lib. 9. c. 3.

† Ibid. c. 4.

relief of one knight's fee, according to the custom of the realm, was said to be reasonable at a hundred shillings. The relief in soccage-tenure was one year's value of the land. As to baronies, nothing certain was fixed concerning their relief; but the relief they were to pay was measured by the pleasure and mercy of the king alone, to whom it was due. The law was the same in serjeanties ².

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WHEN the lord and the heir had come to an agreement respecting what was to be paid for relief, the heir might exact reasonable aids from *his* homagers; always proportioning this demand to their circumstances, and the size of their fees; that it might not become such a grievous imposition as would intirely destroy their *contentment*, or, to use an English term which has been formed from it, their *countenance*, and appearance in the world: and no other measure was settled for ascertaining these aids but this regard to facts and circumstances. With the above precautions, a lord, in other cases, might exact similar aids of his tenants; as when he made his son and heir a knight, or when he married his eldest daughter. Glanville made a question, whether lords could demand these aids of their tenants to enable them to carry on their wars? The practice, at least, was for them never to attempt to distrain for aids on this occasion, but to leave them to the voluntary generosity of their tenants. For the other aids, so long as they were reasonable, lords might, by judgment of their courts, without the *precept* or command of the king or his chief justice, distrain their tenants by the chattels that were to be found on their fees, or, if need were, by the fees themselves; so, however, that the proceeding was had regularly by the judgment of the court, and consistent with the reasonable custom thereof. If a lord could distrain his tenants for payment of these reasonable aids, much more, says Glanville, might he make distress for payment of his relief, and for such service as was due to him on

Aids.

² Glanv. lib. 9. c. 4.

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JOHN.

Administration
of justice.

account of the fee*. Thus we see the remedy by distress had, in Glanville's time, become a process first against the chattels; and only *si opus fuerit*, was there recourse to the fee itself; though it is probable, that in the origin of this summary method of compelling tenants to do their services, it was usual to take the whole fee into the lord's hands as a forfeiture, to enable him to do that justice to himself which his tenant refused; but this rigorous proceeding was by degrees softened down to one against the moveables; and only in default of them, against the land.

HAVING taken this view of the nature of tenures and estates, it seems necessary to consider the order of administering justice, with the process and modes of proceeding in obtaining redress for any injury to property or to the person; an enquiry not less interesting than the former, as it contains in it the first outline of that course of judicature which prevails, with considerable alterations indeed, at this day. In pursuing this, there will be occasion to notice such parts of the law concerning private rights as have not already been mentioned.

PLEAS were divided into *civil* and *criminal*. Criminal pleas were again divided into such as belonged *ad coronam domini regis*, and such as were within the jurisdiction of the sheriff. The pleas belonging to the king's crown were, the *crimen læsæ majestatis*, as the death of the king, or any sedition touching his person or the realm; pleas concerning the fraudulent concealment of treasure trove; pleas *de pace domini regis infractâ*; pleas of homicide, burning, robbery, rape, and the *crimen falsi*; all which offences were punished with death, or the loss of limbs. Only the crime of theft was excepted, which was within the cognizance of the sheriff, and determinable in the county court. The sheriff, in like manner, in cases where the lord of a franchise neglected to do justice, had cognizance of *medietæ*, as they were then called, *verbera*, and *plagæ*; unless the party com-

* Glanv. c. 2.

plaining added, as he might if he pleased, an allegation, *de pace domini regis infractâ*, namely, that it was against the king's peace^b.

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JOHN.

CIVIL pleas were divided in the same way; some being entertained in the king's court, and others in that of the sheriff. In the king's court were determined pleas concerning baronies; that is, manors held of the king *in capite*; pleas concerning advowsons, villenage, dower *unde nihil*; complaints for breach of final concords made in the king's court; questions of homage, reliefs, and purprestures; pleas of debt owing by lay persons, or, as they were called, *placita de debitis laicorum*^c.

THE following civil pleas belonged to the sheriff's court: pleas of right to freehold, when the court of the lord of whom the land was held, had made default in determining the right; and questions upon villenage; and these pleas were always commenced by the king's writ.

BESIDES these, which were all *de proprietate*, there were other pleas *super possessione*, which were decided by recognition of jurors. Of all these we shall speak in their order.

FIRST, of pleas in the king's court, or *curia regis*, as it was then called. When any one, says Glanville, complained to the king or his justices concerning his fee or freehold, if "the matter was such as was proper for that tribunal, or such as the king pleased should be examined there, the party had a writ of summons to the sheriff, directing him to command the wrong doer to restore the land of which he had deformed the complainant; and unless he did, to summon him by good summoners to ap-

^b In this distinction between the sheriff's jurisdiction and that of the king, we see the reason of the allegation in modern indictments and writs, *vi et armis* of "the king's crown and dignity," "the king's peace," and "the peace;" this

last expression being sufficient, after "the peace of the sheriff" had ceased to be distinguished as a separate jurisdiction. Glanville, lib. 1. c. 1, 2.

^c Glanv. lib. 1. c. 3.

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the CONQ.to
JOHN.

A writ of right.

"pear before the king or his justices, at such a day, to shew wherefore he refused so to do." The following was the form of the writ: *Rex vicecomiti salutem: Praecepit A. quod sine dilatione reddat B. unam bidam terrae in villa (naming it) unde idem B. queritur, quod praedictus A. ei deincepsat: et nisi fecerit, summons eum per bonos summonitores, quod sit ibi coram me vel iustitiariis meis in crastino post octavas clausi Paschae apud (naming the place where the court sat) ostensorus quare non fecerit, et habeas ibi summonitores, et hoc breve. Teste Ranulpho de Glanvilla apud Clarendon^a.*

AT the appointed day the party summoned either came or not, or sent a messenger to *essoine* him, that is, to make an excuse for his not coming. If he neither came, nor sent an *essoine*, the demandant was to appear in court, and wait his adversary for three days. If he did not appear at the fourth day, and the summoners offered to prove they had duly summoned him, another writ of summons issued, appointing his appearance in fifteen days at least; and this writ required him, as well to answer upon the merits of the complaint, as for his contempt in disobeying the first summons. When three writs in this form had issued, and he neither appeared nor sent any one to *essoine* him, his land was taken into the king's hands, and so it remained for fifteen days; and if he did not appear within that time, the seisin of it was adjudged to the complainant, nor could the owner have any remedy to recover it, but by writ of right: yet if he appeared within those fifteen days, and was willing to *replevy* the land, he was commanded to come again on the fourth day, and right should be done; when, if he appeared, the seisin was restored. Indeed, if he had appeared at the third summons, and acknowledged all the

^a Glanv. lib. 1. c. 6.^b *Essonium*, or *Exoniam*, says Spelman: ex privativum, et *fung*, cura; ab angustia, cura, vel labore liberare; which is a more probablederivation, than *essone* & *son*; though it should signify to excuse by means of an oath; which, to be sure, is the precise nature of an *essoine*. Vld. Spelman. voce *Essonare*.

former summonses, he would lose the seisin of his land, unless he could produce a writ from the king to the justices, declaring that he had been in the king's service at the time appointed by the court, and commanding that he should not be held as a defaulter, nor suffer as such ^f.

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If the party denied that he was summoned, he was to swear it *duodecimâ manu*; and at the appointed day, should any of the jurors who were to swear it, fail, or any be lawfully excepted to, and no other put in his place, that very instant the defendant lost the seisin of his land, as a defaulter. If he disproved the summons in the above way, he was, the same day, to answer to the action.

THUS far of appearance and non-appearance: next as ^{Effoins.} to *essoins*. If the party did not appear at the first summons, but sent a reasonable *essoins*, it would be received: and he might, in like manner, *essoins* himself three times successively. The causes of excuse, called *essoins*, allowed in the king's court, were many. The principal *essoins* was that *de infirmitate*. This was of two kinds: one was, *de infirmitate veniendi*; the other, *de infirmitate reseantise*; of which the first was called afterwards, *de malo veniendi*; the latter, *de malo leeli*.

If at the first summons the *essoins de infirmitate veniendi* was cast, it was in the election of the complainant, upon his appearing in court, to demand from the *essonator*, or person who made it, a lawful proof of the *essoins*, on the very day; or that he should find pledges^g; or make a solemn engagement to bring a warrant or proof of the *essoins*, that is, the principal summoned, at a day appointed. And in this manner might the tenant be *essoined* three times successively. If he did not come at the third day, nor send an *essoins*, the court awarded, that he should appear on another day, in person, or by a sufficient attorney (or *respondant*, as he was then called), who would be received *ad lucran-*

^f Glanv. lib. 1. c. 7, 8.

^g Glanville's words are, *vel plegium inveniet, vel fidem dabit.*

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dum vel perdendum in his place. If the party summoned appeared on the fourth day, after three *essoins*, and avowed them all, he was required to prove the truth of them by his own oath and that of another, and on the same day was to answer to the action: and if he did not appear at the fourth day, nor send his attorney, his land was taken into the king's hands, as before mentioned. There issued also an attachment against the *essoimators* *tanquam falsarios*, for not performing the engagement they had made for their principal; and in the mean time the principal was summoned, to shew cause why he did not avow and make good what his *essoimator* had engaged for in his name: a summons went also against the pledge put in, as above mentioned, by the *essoimator*, to shew cause why he did not produce the principal to make good the *essoin* ^b.

If the principal appeared within the fifteen days, and was willing to replevy the land, a day was given him; and if he then gave his sureties, he recovered his *seisin*. If he denied all the summonses, and disproved them *duodecimâ manu*; or if he admitted the first, avowed his three *essoins*, and on the fourth day produced the above-mentioned writ, testifying that he was in the king's service; he could in that case recover *seisin* of the land: but if he did not appear within the fifteen days, the *seisin* was adjudged to the complainant, as before mentioned. The direction in the writ to the sheriff for taking the land in the case of the king was, *capias in manum meam*; and of that for giving possession of it to the complainant was, *seisia: M. de tantâ terrâ, &c.*

In the same manner a man might *essoin* himself three times *de infirmitate resedens*, or *de malo lecti*; and if the party appeared not at the third summons, the judgment of the court was, that it be seen whether the infirmity be a *languor*, or not. For this purpose a writ issued, commanding the sheriff to send four lawful men of his county

^b Glanv. lib. 1. c. 12, 13, 14, 15.

to view the party: and if they saw that it was *languor*, they were to appoint him to appear, or send his attorney, in a year and a day; but if they thought it not to be a *languor*, they were to appoint a certain day of appearance for him or his attorney, at which time the four viewers were likewise to appear and testify their view. Two essoinators were necessary to make this essoin¹.

PERHAPS the first two essoins might be *veniendi*, and the third *de reseantifi*; in which case, persons were to be sent to view whether *languor* or not: but if the first two were *de reseantifi*, and the third *veniendi*, they were adjudged as if all were *veniendi*: for it was a rule, always to judge according to the nature of the last essoin².

WE have seen that the land of a person who did not appear, was taken into the king's hands. It was also the practice, if a person had appeared and answered, and a future day was given, and at that day he neither came nor sent his attorney, that his land should be taken into the king's hands; but Glanville states this material difference, that he could not in this case replevy it; he was also summoned to hear the judgment of the court upon his default: however, whether he appeared or not, he lost his seisin for the first default, unless he could avoid the summons by the before-mentioned writ *de servitio regis*. A person who had answered in court and departed in a lawful way, might recur to the three essoins, unless there was any agreement to waive them.

IF a person had essoined himself once, and at the second day he neither came nor essoined himself, we have seen that a writ issued to the sheriff to *attach* the essoinator *tanquam falsarium*, as before mentioned³. That the essoinator might be treated with a reasonable fairness, he also was allowed to essoin himself. Thus, if any obstacle happened to retard him in going to essoin his principal, so that

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the CONQ.TO
JOHN.¹ Glanv. lib. 1. c. 18, 19.² Ibid. c. 20.³ Ibid. c. 20, 21.

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he could not get to the court at the appointed day, he had till the fourth day, as his principal had; and if any one came within that time to essoin him, he was received in like manner as the essonator of the principal^m. The principal might also, if he pleased, send a second essonator, who was to state to the court the excuse of the principal, that he sent that excuse by an essonator who was detained by accidents on the road, and that he would prove this as the court should awardⁿ. In all cases of essoins, if the adverse party had departed, upon a day having been given by the essonator, the appearance of the principal within the fourth day signified nothing: for the day given by the essonator must still be observed^o.

Thus far of the essoins *de infirmitate veniendi*, and *de infirmitate reserantisæ*; or, as they have since been called, *de malo veniendi*, and *de malo lecti*. Glanville mentions several others; as that *de ultra mare*; upon which the party had at least forty days. Another was, *subita aquarum inundatio*, or the like unexpected accident, which was allowed to save the four days^p. Another was called *per servitium regis*; and in that case the plea was put without a day, till the party returned from the service he was on: wherefore this was never allowed to those who were constantly in the service of the king, such persons being left to the ordinary course of the court. This essoin *de servitio regis* lay only for persons in the king's service before the plea was commenced. If any went into the king's service after the plea commenced and essoined himself, there was this difference, whether he was there *per mandatum regis ex necessitate*, or *ex voluntate*, without any mandate. In the former case, the above-mentioned order was observed, and the plea was put *sine die*: in the latter, it was not. Another distinction was made, whether the service was *ultra mare*, or *citra mare*: if the former, he had the usual forty days, and

^m Glanv. lib. 1. c. 21. 22. ⁿ Ibid. c. 23. ^o Ibid. c. 24. ^p Ibid. c. 25, 26.

was expected at the expiration of them to appear and shew the king's writ, as we have before seen: in the latter, it was at the discretion of the justices to give a less or a greater time, as they thought it best suited the king's service ^q.

THERE was an *essoins per infirmitatem*, which infirmity must be such as had happened since the party arrived in the town where the court was. In this case the court ordered, that he should appear the next day, and so on for three days successively; and if he made the same excuse the third day, then four knights were directed by the court to attend and see whether he was able to make his appearance or not: if not, and they testified the same in court, he had a respite for, at least, fifteen days ^r.

ANOTHER *essoins* was *de esse in peregrinatione*. There was a distinction in this case, as in that of the king's service, whether the party had commenced his journey before the suit, or since. If he had been summoned first, the proceeding took its course, as before stated: if not, then there was a difference, whether his journey was towards Jerusalem, or otherways. In the former case, he had a respite of a year and a day, at least; in other cases, the respite lay in the discretion of the justices ^s.

HAVING considered the circumstances relating to the tenant's appearance in court, let us pause a while, and look back to the nature of the writ which was to compel this appearance, and the method taken for its execution. The writ of summons had in it this clause addressed to the sheriff, "*et habeas ibi summonitores, et hoc breve*:" in consequence of which the first inquiry, when the demandant offered himself at the appointed day in court, was, whether the sheriff had there the writ and the summoners. If he had, and the summons was proved, they proceeded as before mentioned; but if the sheriff did not appear within the fourth day, (which was allowed also to the tenant) then

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^q Glanv. lib. 1. c. 27.^r Ibid. c. 28.^s Ibid. c. 29.

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there issued a writ *de secundâ summonitione*, directing him to summon the tenant, and to appear himself and shew cause why he did not summon him upon the first writ. This contained the first writ of summons, with the addition of this clause: *et tu ipse sis ibi ostensurus quare illam summonitionem ei non feceris, sicut tibi præceptum fuit per aliud breve meum, et habeas ibi hoc breve, et illud aliud breve.* If the sheriff came at the day, and confessed that he had not executed the writ, he was then, as they termed it, *in misericordiâ regis*, that is, he was amerced; the demandant lost a day without effect, and the tenant was to be summoned again: but if the sheriff averred that he commanded lawful summoners to make the first summons, and they, being present, admitted it, they as well as the sheriff were amerced, if they had not obeyed it. But if they denied that the sheriff gave them charge of the summons, then there was a distinction, whether the sheriff gave it in the county-court or not. Such matters ought, properly, to be transacted in that court; and if the plea was commenced some time before the county-court, Glanville says, *attachabitur usque ad comitatum*, and then a complete summons was to be made. If, then, the summoners had been enjoined in the county, and it was so proved, the summoners were amerced; for this was a solemn act, which they would not be allowed to deny: if out of the county, and they denied the command, then the sheriff alone was amerced, for executing the writ in a private and improper manner: for all public acts, such as enjoining summons to be made, taking pledges of prosecuting, and pledges *de stando ad rectum*, ought to be transacted in a public manner, that there might be no debate concerning such prefatory process; a circumstance which would lead to great impediments in suits. If the summoners were not present at the appointed day, but sent their essonators, who essoined them; and added, that they had properly summoned the party; in that case, the first day was considered as not lost to the demandant, and the

the summoners were amerced for not appearing and proving the summons, as was enjoined them, unless they could excuse themselves by the king's writ *de servitio*. It should be remembered, that one or other of the summoners might excuse himself at the first day; and in that case, the first day was not considered as lost to the demandant.

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SUCH was the proceeding where the tenant was simply summoned, without any pledges being given. It may be proper to mention in this place, what the process would be, when an *attachment* was necessary. If the suit was of a kind to make it necessary for the tenant to find pledges *de stando ad rectum* for his appearance, (as was the case in pleas for breach of a final concord made before the king or his justices, and for novel disseisin) and these pledges had been recorded in the county court, or before the justices; then if the tenant did not appear, nor essoin himself, the pledges were adjudged to be amerced, and further pledges were required, to engage for his answering to the suit. This was to be done three times; and if he did not come at the third summons, his land was taken into the king's hands, in like manner as before mentioned; and the pledges likewise were amerced, and summoned to appear in court at a certain day, in order to hear the judgment. This was the course of *attachment* in civil causes: but in criminal ones, as in those *de pace domini regis infractâ*, if the party did not appear at the third summons, there issued a *capias* to take the body, the pledges being amerced as in the former cases.

THUS far of the default of the tenant. If the demandant did not appear at the first day, he might essoin himself in like manner as the tenant. If he neglected both, the tenant was dismissed *sine die*; so, however, as that the demandant might institute another suit for the same cause of action. But as to this, and the consequence of the tenant's default, there was a diversity of opinions in Glanville's

* Glanv. lib. 1. c. 30, 31.

* Ibid. c. 31.

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time. Some held, that he only lost his first writ, with his costs and expences, but not his action; so that he was at liberty to commence another: others thought he lost his action totally, without any right of recovery; and that he should be amerced for his contempt of court. Others were of opinion, that he lay at the king's mercy, whether he should be admitted to bring his action again. In either case, if the demandant had found pledges *de clamore suo prosequendo*, as was the case in some suits, his pledges were likewise to be amerced. Glanville further adds, that in criminal matters and those relating to the peace, where the king had an interest, as he was bound to prosecute, his body was to be taken, and kept in custody until he prosecuted his appeal: besides which, his pledges were still to be amerced*. If both demandant and tenant were absent at the day, it was in the discretion of the king or his justices to proceed against both; against the tenant for contempt of court, and the demandant for false claim†.

WHEN obedience had been paid to the writs of summons, and both parties were in court, the demandant made his demand of the land in question; and then the tenant might, if he pleased, pray a view of the land. If the tenant had no other land in the same vill, the view was made without delay; but if he had, the tenant was respited, and another day given in court. When he departed in this manner from court, he might claim three essoins; and a writ was directed to the sheriff to send *liberos et legales homines* (not specifying any number) of the vicinage of the vill to view the land in question, and to have four of them to certify their view to the court‡.

AFTER the three essoins accompanying the view, and after both parties had appeared in court; then the demandant was to set forth his claim in the following manner: *Peto, &c.* "I demand against *B.* one hide of land in such "a vill (naming it), as my right and inheritance, of which

* Glanv. lib. 1. c. 32.

† Ibid. 32.

‡ Ibid. lib. 2. c. 1, 2.

" my father (or grandfather, as it might be) was seized in
" his demesne as of fee, in the time of Henry I. (or after
" the first coronation of the king, as it might be), and
" from which he received produce to the value of fifty shil-
" lings at least (as in corn, hay, and other produce); and this
" I am ready to prove by this my free man John: and if any
" thing should happen to him; by him, or him" (for he could
name several, though only one could wage battle) " who
" saw and heard this." Or he might conclude in this form:
" and this I am ready to prove by this my free man John,
" whom his father, on his death-bed, enjoined, by the
" faith a son owes a father, that if he ever heard of any
" plea being moved concerning this land, he would
" *deraign* (or prove) this ^a, as what his father had seen and
" heard ^b." This was the manner in which the de-
mandant spread out the substance of his writ; and his
reliance was always upon the testimony *de visu et auditu*.

AFTER the demandant had thus made his claim, it was
in the election of the tenant, whether he would defend
himself by *duel*, or avail himself of the privilege granted by
the king's late statute, and demand that a *recognition* should
be made, which of the two had the greatest right to the
land. If he chose the duel, he was to defend his right
de verbo in verbum, as the demandant had set it forth; either
in person, or by some fit champion. It was a rule, that
when the duel was once waged, the tenant could not
claim the benefit of the new law.

The duel.

AFTER the duel was waged, the tenant might *essoins*
himself three times, as for himself; and in addition to
these, three times in respect of his champion. When all
these *essoins* were elapsed, the demandant was to bring his
champion into court, ready for the engagement: the
champion was to be the same person, upon whom he put
the proof in his claim: nor could he put any one in his

^a Glanville's words are: *Hoc dixi- et auditu.*
et vidi, sed id quod pater suus vidit,

^b Glanv. lib. 2. c. 3.

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place after the duel was once waged. If he who waged the duel happened to die, and that was declared by the voice of the vicinage, he might recur to one of the others named in the claim; or even a stranger, if that stranger was qualified to be a proper witness; for that qualification was always required in the champion of the demandant. But this was only where the champion died by a natural death; for if it happened by any fault or neglect of his own, no other could be substituted in his place, and the demandant lost his suit. Glanville states it as a question, whether the demandant's champion himself could nominate any one in his place; and he thought, that by the old and established custom of the realm, he could not appoint any one, except his son born in lawful wedlock.

As we before said, the champion of the demandant must be a person who could be a proper witness of the matter in question *per visum, et auditum*; the demandant of consequence could not be his own champion; but the tenant might defend himself, either *in person*, or by another fit champion. If the champion of the tenant died, it was a question what was to be done; whether the tenant might defend himself by some other, or was to lose his suit, or only seisin of the land: Glanville thought it was to be ordered exactly as in case of the demandant's champion dying.

It sometimes happened, that the champion was a person hired for a reward. This was a good cause of exception; and if the adverse party offered to prove it by one who saw the reward given, he was to be heard to this point; and the duel, in the mean time, was deferred. If the champion of the demandant was convicted of this charge, or was vanquished in the duel upon the point of right, the demandant lost his suit, and the champion lost his *legem ternae*; that is, he was never after to be received as a witness to wage duel for any one; though he might in a cause of his own, either as defendant or appellant, in matters of

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the peace and of personal injury; he might also defend by duel his own right to a fee and inheritance. In addition to the loss of his law, he was to be fined in the penalty of sixty shillings, *nomine recreantisæ*, on account of his cowardice. If the champion of the tenant was conquered, his principal lost the land in question, with all the fruits and produce found on it at the time of the seisin, and was never to be heard in a court of justice concerning the same; for it was a rule, that whatever was once determined in court by duel, remained ever after fixed and unalterable. There, accordingly, issued a writ to the sheriff, *quod sine dilatione seissias M. de una bida terra, &c. — quia ea bida terre adjudicata est ei in curia mea per finem duelli*. When the champion of the demandant was conquered, as before mentioned, the tenant was quit-claimed^c from any right of the demandant to recover against him.

THIS was the course of proceeding, when the tenant, in a writ of right, chose to defend his right by duel^d. But the tenant might avail himself of the provision lately made by Henry II. and put himself upon the assise; to which the demandant might consent, and put himself also upon the assise.

If the demandant had expressed before the justices in open court^e his consent to put himself on the assise, he was not allowed to retract, but must stand or fall by the assise, unless he could shew some good cause why the assise should not pass between them. One cause which might be shewn, was, that they were of the same blood, and descended from the same stock, whence the inheritance came. If this was admitted by the other party, the assise was waived, and the question was argued and determined by the court; it being a point of law, which was

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^c *Quicquid clamabatur de ejus clamore.*

^d Glanv. lib. 2. c. 4. 5.

^e So I construe *coram iusticiis in bancs voluntibus*, tho' this phrase has been quoted by some persons to shew

that, in the time of Glanville, there were justices *de banco*, in the modern sense of those words; a construction which this passage will certainly not warrant.

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the nearest to the first stock, and the heir with the better title. In this manner the nearest heir obtained the land, unless it could be shewn that he or his ancestor had any way lost it, sold it, made a gift of it, changed it, or by any other means had parted with it; and if the cause was rested upon any of these points of fact, it might be determined, says Glanville, by the duel.

SUPPOSE the person who had put himself on the assise, had denied this impediment of relationship; such a question was tried by calling into court the common relations of both parties. If these agreed unanimously that they were related, it was usual to abide by this declaration; but if one of the litigants still continued to deny it to be so, the last resort was to the vicinage; and if they agreed with the relations, this complete testimony was acquiesced in. Should the relations differ in their testimony, the vicinage was in like manner called in, and their verdict was decisive. If, upon this inquisition being made, it appeared to the court and justices that the parties were not descended from the same stock, the person who made the exception was to lose his suit. If there was no exception taken, then the assise proceeded, and its determination was as final as that by duel.

BEFORE we enter on the proceeding of the assise, let us reflect with Glanville upon the nature and design of this innovation upon the old method of trial. "The assise," says that author², "is a royal benefit conferred on the na-

¹ Glanv. lib. 2. c. 6.

² The words of Glanville are: *Est autem assisa regale quoddam beneficium elementis principis, de consilio procerum populo indultum.* I quote this from the last edition of Glanville, adhering to the reading which is warranted by the consent of the Harleian, Cottonian, and Bodleian manuscripts, in opposition to the old printed text, which reads *magna assisa*, &c. an epithet which, I am clear, has been interpolated in this and other passages of Glanville by a later hand at a period when the distinction between the

great assise and other assises had grown familiar among lawyers. This corruption of the text is so remarkable a passage as the present, has had the effect of establishing a vulgar opinion, that the alteration made by Henry II. related only to the trial in the writ of right; an opinion which is not warranted by the history of this revolution, and which is left without any support, as it should seem, when the concurring testimony of these three MSS. is against the insertion of this epithet in most of the places where it is used.

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"tion by the prince in his clemency, by the advice of his nobles, as an expedient whereby the lives and interests of his subjects might be preserved, and their property and rights enjoyed, without being any longer obliged to submit to the doubtful chance of the duel. After this (continues he) the calamity of a violent death, which sometimes happened to champions, might be avoided, as well as that perpetual infamy and disgrace attendant upon the vanquished, when he had once pronounced the *infestum et execrandum verbum*." The horrible word here alluded to was *craven*; by which the champion signified that he yielded, and submitted himself to all the consequences attending such a defeat. "This legal institution, says Glanville, is founded in the greatest equity, and the fullest desire of doing justice. For a question of right, which, after many and long delays, can hardly ever be made out by duel, is investigated with dispatch and ease, by the benefit of this constitution. The assise itself is not clogged with so many *essoins* as the duel. By this the expences of the poor are spared, and the labour of all is shortened. In fine, as the credit of many fit witnesses has a greater influence in judicial enquiries than that of one only; so this constitution contains in it more justice than the duel. The duel proceeds upon the testimony of one witness only; this constitution requires the oaths of at least twelve lawful men^b." Such is the manner in which Glanville speaks of the institution of the assise.

THE proceeding by assise was thus: The party who had put himself upon the assise, sued out a writ *de pace habenda*. This was to prohibit the lord (if the suit was in the lord's court) from entertaining any suit, in which the duel had not been already waged, between the same parties for the same land, because one of the parties had put himself upon the king's assise, and had prayed a recognition to be made,

^b Glanv. lib. 1. c. 7.

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who had the most right¹. Upon this, the demandant came to the court, and prayed another writ, whereby four lawful knights of the county might be directed to chuse twelve lawful knights of the vicinage, who should say upon their oaths, which party had most right to the land in question. As this is the first process for the return of jurors, of which we have any mention, it may be proper to insert it at length. It ran in these words: *Rex vicecomiti salutem. Summone per bonos summonitores quatuordecim milites de vicineto de Stoke, quod sint ad clausum Pasche coram me vel iustitiis meis apud Westmonasterium ad eligendum super sacramentum suum duodecim legales milites de eodem vicineto, qui melius veritatem scient, ad recognoscendum super sacramentum suum utrum M. aut R. majus jus habeat in una hidâ terræ in Stoke quam M. clamat versus R. per hoc meum, et unde R. qui tenens est, posuit se in assisam meam, et petis recognitionem fieri, qui eorum majus jus habeat in terrâ illâ, et nomina eorum subreviari facias. Et summone per bonos summonitores R. qui terram illam tenet, quod tunc sit ibi auditorus illam electionem, et habeas ibi summonitores, &c.*

At the day appointed the tenant might essoin himself three times; for it was a rule, that as often as either party appeared in court, and did what he was commanded by the law to do, he might again recur to his three essoins. But if this was allowed, the consequence would be, that as many or more essoins would intervene in the proceeding by assise than by duel, which would ill agree with what we have just said about the conscientiousness of this new method. For suppose the tenant essoined himself three times, on the election of the twelve knights by the four; afterwards, when he appeared in court, some or other of the four knights might essoin himself; and then, after these essoins, the tenant might again essoin himself afresh; so that the assise would hardly ever be brought to any effect: it was

¹ Glanv. lib. 2, c. 3, 9.

therefore necessary to defeat the operation of the above rule, in this instance. A constitution was accordingly passed, enabling the court to make order for removing these obstacles, and expediting the proceeding; in pursuance of which, when the four knights appeared at the appointed day in court, ready to chuse the twelve knights, they were authorized, whether the tenant appeared or not, to proceed to the election. If he had been present, he might make a lawful exception to any of the twelve; and therefore the court would, in his absence, direct more than twelve to be elected, that when he appeared, he might have a greater chance to find twelve unexceptionable jurors. Jurors, says Glanville, might be excepted against in the same manner as witnesses were rejected in the court christian; jurors being in fact only witnesses, and the testimony of witnesses being always considered as a matter of canonical regulation.

So desirous were they of avoiding delay, that upon the tenant appearing, if all the four knights did not appear, yet by the advice of the court, and assent of parties, one of the knights, taking two or three others of the county then in court, though not summoned, might proceed to elect the twelve: though, to avoid all cavil, and in order to have enough to make the election, they usually had the caution to call six or more knights to court. In all such points, the discretion of the court was suffered to govern the established course of proceeding; which, says Glanville, the king or his justices might temper and accommodate to the equity of the case then before them^k.

WHEN the twelve knights were elected, they were summoned by the following writ: *Rex vicecomiti salutem. Summane per bonos summonitores illos duodecim milites, scilicet, A. B. &c. quod sint die, &c. coram me vel iustitiis meis ad, &c. parati sacramento recognoscere utrum R. vel N. majus*

^k Glanv. lib. 2. c. 12.

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ius habeat in una bidā terra, quam prædictus R. qui clamat versus prædictum N. et unde prædictus N. qui rem illam tenet, posuit se in assiam nostram, et petit inde recognitionem, quis eorum majus jus habeat in re petitā; et interim terram illam, unde exigitur servitium, videant: et summo per bonos summonitores N. qui rem ipsam tenet, quā tunc sit illi audieturus illam recognitionem. At the day appointed for the knights to make their recognition, no essoin could be cast by the tenant, nor was his presence necessary: as he had once put himself upon the assise, he had now nothing to say why the recognition should not proceed. It was different with regard to the demandant; for if he essoined himself, which he might do, the assise remained for that day, and another day was given: for it was a rule, that though any one might lose by his default of appearance, yet no one should gain any thing if not present in court. *Perdere potest quis propter defaultam, lucrari verò nemo potest omnino absens*¹.

THE assise being about to make their recognition, it is next to be considered how they were enabled to do it. Now, some, or all, might know the truth of the matter, or all might be ignorant of it. If none of them knew any thing of the matter, and they testified the same in court, upon their oaths; the court resorted to others, till they found those who did know the truth. If some were acquainted with the fact, and some not, the latter were rejected, and others called in, till twelve at least were found who could agree. Again, if some were for one of the parties, and some for the other, fresh jurors were to be added till twelve were found who agreed in opinion for one of the parties. It is to be observed, that all who were called in, were to swear that they would not speak what was false, nor knowingly be silent as to what was true; and the knowledge they were expected to have of the matter, must have been from what they themselves had seen or heard, or from de-

¹ Glanv. lib. 2. c. 15, 16.

clarations of their fathers, and such evidence as claimed equal credit with that of their own ears or eyes. *Per proprium visum suum et auditum vel per verba patrum suorum, et per talia quibus fidem teneantur habere ut propriis*^m.

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WHEN the twelve knights were agreed in the truth, they then proceeded formally to recognise, whether the demandant or tenant had most right in the thing in question. If they said the tenant had most right, or said that which satisfied the king or his justices that he had most right, then the judgment of the court was, that he should go quit of the demandant for ever, so as the demandant should never be heard again in court with effect; for a suit once lawfully determined by the king's great assise, could never be stirred again on any occasion whatever. If the assise were of opinion for the demandant, and the court gave judgment accordingly, then the adversary lost the land in question, with all its fruits and profits found there at the time of the seisin^a.

UPON this there issued a writ of execution, *quod seifias N. de una hida, &c. quia idem N. dirationavit terram illam in curia mea per recognitionem, &c.*^a reciting the mode of trial, as the before mentioned writ of seifin did the duel. We may here notice, that the duel and assise had become so co-extensive in their consequences, as for it to grow into a rule, that the duel should not be where the assise was not allowed, nor the assise where there was no duel^b. Assises lay concerning services, land, demands of service, rights of advowson, and that not only against a stranger, but even against a lord^c.

THE regal constitution by which the assise was appointed, had also ordained a punishment for jurors *temere jurantem*, or who swore falsely. If any were proved, or confessed themselves, guilty of perjury, they were to be spoiled of all their chattels and moveables, which were forfeited to

^a Glanv. lib. 2. c. 27. ^b Ibid. c. 18. ^c Ibid. c. 20. ^d Ibid. c. 19. ^e Ibid. c. 13.

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the crown; but they were permitted by the clemency of the king to retain their freeholds; they were to be thrown into prison, and be there detained for a year at least; they were to lose the *legem terræ*, or, in other words, incur the brand of perpetual infamy¹.

IT was a question in Glanville's time, what was to be done, if no knights could be found, of the vicinage or of the county, who knew the truth of the matter; whether the tenant was therefore to prevail, as the person in possession; or the demandant to lose his right, if he had any. Suppose, says he, two or three lawful men, or any other number less than twelve, who were witnesses of the fact, offered themselves in court *ad dirationandum*, and said and did every thing in court proper for the occasion, could they or could they not be heard²?

Vouching to
warranty.

THIS was the order of proceeding, when the presence of the tenant only was necessary, and no one else was brought in to answer. There were many cases where it was requisite to call in a third person; as when the tenant declared in court, that the thing in question was not his own, but that he held it *ex commodato*, or *ex locato*, or in *vadium*, that is, in *gage* or *pledge*, or committed to his custody, or in some other way intrusted to him by the real owner; or if he should declare the thing was his own, but that he had some one to warrant it, as the person who made a gift of it, or sold it, or gave it in exchange: or should he declare in court, that the thing was not his, but belonging to another person, that person was to be summoned by some other similar writ; and so the suit was to be carried on afresh against him. When he appeared in court, he, in like manner, might admit the thing to be his, or not. If he said it was not his, the tenant who had said it was, *ipse factus* lost the land without recovery, and was summoned in order

¹ Glanv. lib. 2. c. 19.

² Ibid. c. 21.

to hear the judgment of the court to that effect; and whether he came or not, the adversary recovered seisin.

WHEN the tenant called a person for any of the above reasons *to warrant* the land, a day was given him to have in court his warrantor; and upon this he was entitled to three *essoins* respecting himself, and three others respecting the person of his warrantor. At length the warrantor appearing in court, he either warranted the land or not. If he would enter into the warranty, the suit was from thence carried on with him, and every thing went under his name, in lieu of the tenant; not but that the tenant, if he had *essoined* himself, would be considered as a defaulter, if absent. If the warrantor, being present in court, declined entering into the warrant, the suit was to be carried on between the tenant and him; and after allegations on both sides, they might come to the duel, although, perhaps, the tenant might not be able to shew a charter of warranty, but could only produce a fit witness to deraign it. The object of all this was, to prove the warrantor to be bound to the warranty, which would make the tenant entirely safe; for should the land be recovered from him, the warrantor, if able, was bound by law to give him an *excambium*, as they called it, or an equivalent in recompence.

As this was the effect of a warranty when proved, it often happened that a person called to warranty was shy of coming to court: at the prayer of the tenant, therefore, the court would think it advisable to compel him, by a writ of summons *ad warrantizandum*¹.

At the day appointed, this person, like all others who were summoned to appear in court, might *essoin* himself three times. At the third *essoin* the court would award, that at the fourth appointed day he, or some attorney for him, should appear; but if he did not, there seems to have been a doubt what should be done to punish the contempt: for if the land in question was taken into the king's

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¹ Glanv. lib. 3. c. 2, 3.

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hands, this would seem unjust to the tenant, who had not been adjudged in default; and yet if it was not done, there seemed to be a want of justice to the demandant, whose suit was delayed. Indeed Glanville thought, that, notwithstanding these reasons, the law and custom of the realm required the land to be taken; for no hardship would fall on the tenant; it being a rule, that wheresoever a person lost his land through the default of his warrantor, the warrantor should make him a recompence in value.^u

It sometimes happened, that a tenant neglected to call in the person on whom he had a claim of warranty, and defended the right himself. In this case, if he lost it, he could have no recovery against his warrantor. It was by some made a question, whether, upon the same principle as the tenant might defend his right by duel without the assent and presence of his warrantor, he might put himself upon the king's great assise without his assent and presence; but Glanville thought that the same reason should prevail in both cases.^{*}

A SUIT was sometimes impeded by the absence of lords; as when the demandant claimed the land as belonging to the fee of one, and the tenant as belonging to the fee of another lord. In this case, each lord used to be summoned to appear in court, that the plea might be heard and determined in their presence, lest any injury might otherwise be done to their rights. The lords when summoned might esjoin themselves three times, as was usual in other cases. If the lord of the tenant had had his three esjoins, and the court had directed him to appear, or send his attorney, and he made default, the judgment then was, for the tenant to answer and take upon him the defence: and if he prevailed, he retained the land, and for the future did his suit and service to the king, the lord having lost it by his default, till he appeared and did as the law required. In the same manner the lord of the demandant might esjoin himself three

^u Glanv. lib. 3. c. 4.

^{*} Ibid. c. 5.

times;

times; and if, after that, he absented himself, it was Glanville's opinion, that his essonators and the person of the demandant should be attached for contempt of court, and in that manner be compelled to appear ¹.

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WHEN the two lords had appeared, and the lord of the tenant said that the land was in his fee, he might take upon him the defence of the suit, or intrust it to the tenant; and in either case, should they prevail, their several rights were secured; but if they lost the suit, the lord lost his service, as well as the tenant his land, without any recovery. If the tenant's lord, being present in court, failed of the warranty, and the tenant maintained that he was bound to the warranty, because he or his ancestors had done such and such service to him or his ancestors, as lords of that fee; and he could produce those who had heard and seen this, or a proper witness to deraign it, or other fit and sufficient proof, as the court should award: if the tenant could say this, then he and the lord might interplead with each other ². If the demandant's lord entered into the warranty, and they failed in the suit, the lord in like manner lost his service. But the fate of the demandant was different from that of the tenant, if his lord would not enter into the warranty; for he was amerced for his false claim ³.

THUS has the reader been conducted through the proceeding in a writ of right, with all its incidents and appendages, when prosecuted for the recovery of land. This relation has been somewhat long and minute; but as it contains in it, with some small alteration, the scheme of process and proceeding in most other actions, it was indispensably necessary to trace it with some exactness. After this, the remainder of our enquiry into the course of judicial remedies will be more easy, and the matter will be more various

¹ Glanv. lib. 3. c. 6.² Ibid. c. 7.³ Ibid. c. 8.

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and entertaining. We shall now proceed to speak of other methods of recovering property: and first of advowsons.

AN action for the advowson of a church might be brought either while the church was full, or when it was vacant. If the church was vacant, and any one obstructed the person who thought himself the patron, in presenting a clerk, and claimed the presentation to himself, there was a difference to be made, whether the contest was for the *advowson*; that is, upon the *right* of presenting; or upon the *last presentation*, that is, the *seisin* of the *right* of presenting. If it was upon the last presentation, and the person claiming it said, that he or some ancestor of his made the last donation or presentation; then, says Glanville, the plea is to be conducted according to the late ordinance^b about the advowsons of churches; and an assise was summoned to make recognition *what patron, in time of peace, presented the last deceased person to the church*: of which assise more will be said, when we come to speak of other recognitions. For the present it will be enough to remark, that he who recovered by such an assise, recovered seisin of the presentation so as to present a proper person, with a saving of the demandant's claim as to the right of the advowson.

If the right of advowson only was demanded, the demandant must add something as to the last presentation, either that "he or one of his ancestors had it;" or that the tenant or one of his ancestors had it, or that some stranger had it, or that he was ignorant who had it. Whichsoever of these allegations it might be, if the other party claimed the last presentation as his own or his ancestor's, the recognition was, notwithstanding, to proceed upon the right of presenting, except only in one of the above-mentioned

^b Perhaps Glanville here alludes to the famous statute about assises; or, from the expression, it seems more probable, a statute had been ordained since that, which directed recognitions to be made in case of last presentations. It is not un-

likely, that the many assises which grew into use in the time of Henry II. were introduced at different times, according as this mode of proceeding was recommended by experience of its benefits.

cases; that was, where the demandant admitted that the tenant, or one of his ancestors, had the last presentation; for then, without going to the recognition, he was to present at least one person. When, however, the last presentation had been decided ^a by the assise, as before mentioned, or in any other lawful way, and a person was presented accordingly by the successful party; then the party who was refused to try the right of advowson might go on with the suit, and have the following writ ^b: *Rex vicecomiti salutem. Principe N. quod iuste et sine dilatione dimittat R. advocacionem ecclesie in villa, &c. quam clamat ad se pertinere, et unde queritur quod ipse iniuste ei desorceat: et nisi fecerit, summo per bonos summonitores eum quod sit die, &c. ibi coram nobis vel iustitiis nostris, ostensurus quare non fecerit, &c.*

THE person summoned had the same essoins as were before mentioned in a plea of land; and if, after these, he did not appear at the fourth appointed day in person, or by attorney, Glanville thought the next process was for taking into the king's hands seisin of the presentation. The sheriff was to execute his writ of *capias in manu* in the following way: he was to go to the church, and there declare publicly, in the presence of some honest men, that he seised the presentation into the king's hands: the seisin remained in the king's hands fifteen days, with a liberty to the tenant to replevy it within the fifteen days, as was before stated ^d. In short, after all the essoins were run out, if one or both the parties absented themselves, the course was ordered as in a plea of land.

WHEN both parties appeared in court, the demandant propounded his right in these words: *Peto, &c.* "I demand the advowson of this church as my right, and appertaining to my inheritance, of which I (or one of my ancestors) was seised (in the time of Henry I. or) since

^a *Dirationata.*

^b *Glanv. lib. 4. c. 1.*

^c *Glanv. lib. 4. c. 2. Vid. ant. 114.*

^d *Ibid. c. 374. 5.*

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"the coronation of the king; and being so seised, I presented a person to that church (at one of the before-mentioned times); and so presented him, that he was instituted parson according to my presentation: and if any one will deny this, I have here some honest men who saw and heard it, and are ready to prove it, as the court shall award; and particularly this A. and this B." &c.

WHEN the claim of the demandant was thus set forth, the tenant might defend himself by the *quærel*, or put himself upon the *assise*; and in both cases it would be ordered as before mentioned ^b.

THIS was the manner of contesting a right of advowson when the church was vacant. It might also be contested when the church was full; as if the *parson*, or he who called himself parson, in the church claimed his title by one patron, and another claimed the advowson, the latter might then have the following writ against the parson: *Rex vicecomiti salutem. Summone per bonos summonitores clericum illum M. personam ecclesie, &c. quod sit eam me vel iustitiis meis apud Westmonasterium ad diem, &c. ostensurus quo advocato se tenet in ecclesia illa, cujus advocacionem miles ille M. ad se clamat pertinere. Summone etiam per bonos summonitores ipsum N. qui advocacionem illi desorceat, quod tunc sit ibi, ostensurus quare advocacionem ipsam ei desorceat, &c.* ^c.

IF the clerk did not appear according to the summons, nor send any to *essoîn* him; or if after the three *essoîns* he did not come, or send his attorney; Glanville thought, that having no lay fee by which he might be distrained, the bishop (or his official, in case the fee was vacant) should be commanded to distrain him, or punish his default by taking the church into his hands, or using some other lawful means of compulsion ^d.

^a *Preb. bonitæ.*

^b *Diractione.*

^c Glanv. lib. 4. c. 6.

^b Glanv. lib. 4. c. 7.

^c *Ibid.* c. 8.

^d *Ibid.* c. 9.

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WHEN the clerk appeared in court, he would, perhaps, admit the demandant to be the patron, and would say, that he was instituted upon his presentation, or that of some of his ancestors: if so, the plea went on no farther in the king's court; for if the demandant denied the presentation, he was to maintain this controversy with the clerk before the ecclesiastical judge. Perhaps the clerk said the advowson belonged to the party summoned: now such party was dealt with in this manner: If he came at none of the three summonses, nor sent any esoin; or having esoined himself, neither came nor sent his attorney at the fourth day; the advowson of the church in question was seized into the king's hand, and so it remained for fifteen days; and if he did not appear in those fifteen days, then seisin thereof was given to the demandant. In the mean time, it was a question, what was to be done with the clerk, whether he was *ipso facto* to lose his church, or not. But supposing the party summoned appeared, and disclaimed all right in the church, the suit in the king's court ceased, and the patron and clerk contested their claims in the court christian. Should the church happen to become vacant *pendente lite*, Glanville thought, if there was no question but that, the person against whom the right of advowson was demanded, had the last presentation, either in himself or his ancestors, that he should be allowed to present a clerk, at least till he had lost the seisin: consistently with which he thought, that should a vacancy happen while the advowson was in the king's hands for fifteen days, the patron did not lose that presentation. If the party summoned should say the right of advowson was his, it was tried, as we before said of land. If he prevailed, he and his clerk were freed from the claim of the demandant; if he failed, he and his heirs lost the advowson for ever¹.

WHEN the right of advowson was in this manner determined, it became a question what was to be done with the

¹ Glanv. lib. 4. c. 9.

clerk,

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clerk, who admitted in court that he had the incumbency of the church by presentation of the unsuccessful party. As the king's court could proceed no further than the right of advowson between the two patrons, the party who had now recovered the advowson was to proceed against the clerk before the bishop, or his official: yet after all, if at the time of the presentation the person presenting was believed to have been the patron, he was left in possession of the church during his life; for in the reign of this king, at the Council at Clarendon, a statute had been made concerning clerks who had enjoyed churches by the presentation of patrons *pro tempore*, which ordained, that clerks who had violently intruded themselves into churches during time of war, should not lose such livings during their livesⁿ. This provision saved the titles of many beneficed clerks at that time. Nevertheless, in such case, after the incumbent's death, the presentation returned to the lawful patronⁿ.

THE following points might arise upon what has been said concerning the right of advowson and the last presentation. When a patron had recovered an advowson by de-
raignment in court, and afterwards, in process of time, the parson died; it might be asked, whether the patron against whom the advowson had been recovered, could maintain an assise *de ultimâ presentatione*; and what answer could, in that case, be given to it by the adverse party. For suppose the person bringing the assise had not, but some of his ancestors had had the last presentation; and it was objected to him, that he ought not to have a recognition, because he had lost the advowson to the tenant in the assise, by a solemn judgment of the court, whether this would be a bar to the assise? It should seem, says Glanville, that it would; because, as he had not the last presentation, he never had seisin of the advowson: but, it should seem, says he, li.

ⁿ Vid. ant. p. 54, 55.

ⁿ Glanv. lib. 4. c. 10.

he might well go upon the seisin of his father, notwithstanding what had been determined respecting the right of advowson. And yet if a question could be thus started upon the last presentation, it looks like invalidating the judgment of the king's court, before given, upon the right of advowson; for, when that had been solemnly adjudged, it should hardly seem that he ought by law to recover any seisin, particularly as against him who had before recovered the advowson, unless some new cause had arisen which would entitle him to be heard again. Indeed, if an assise was summoned for that purpose, it would be barred by this answer to it: that the complainant or his ancestors had, it was true, the last presentation; but if he or his ancestors had any right, they lost it by a solemn judgment in court: and this being proved by the record of the court, the suit would be lost, and the complainant amerced^o.

WE have just seen, that questions about presentations belonged to the bishop's court, though the right of advowson was cognizable only in the king's court. It sometimes happened, that when one clerk sued another clerk in the court christian, they claimed a church by two different patrons. One of these patrons, not chusing to have a question upon his right agitated before that tribunal, might pray a writ *to prohibit* the court from proceeding, till the right of advowson was decided in the king's court. As this is the first mention we have of a prohibition to the ecclesiastical court, it may be proper to give this writ at length. It was as follows: *Rex iudicibus, &c. ecclesiasticis salutem. INDICAVIT nobis R. quod cum J. clericus suus teneat ecclesiam, &c. in villa, &c. per suam presentationem, quæ de sua advocacione est, ut dicit, N. clericus eandem petens ex advocacione M. militis, ipsum J. coram vobis in curia christianitatis inde trahit placitum. Si verò præfatus N. ecclesiam illam durationaret ex advocacione prædicti M. palam est quod jam dictus R. jactu-*

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^o Glanv. lib. 4. c. 11.